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Taking a Gamble: Money Laundering after United States v. Santos

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TAKING A GAMBLE: MONEY LAUNDERING AFTER *UNITED STATES V. SANTOS*

I. INTRODUCTION

The Money Laundering Control Act of 1986 (the "Act"), as codified in 18 U.S.C. §§ 1956 and 1957,[1] has long been an exceedingly potent weapon in the hands of federal prosecutors. The Act criminalizes certain financial transactions involving the "proceeds" of over 250 underlying predicate offenses, also known as "specified unlawful activities" ("SUAs").[2] The power and prosecutorial value of the Act come largely from its wide reach and versatility[3] (the predicate offense list includes virtually all white-collar crimes)[4] as well as its relatively harsh sentencing[5] and forfeiture[6] provisions, which make determining the precise application of the statute of paramount importance. The mere threat of a money laundering charge and these accompanying sentencing possibilities is enough to send many defendants scurrying for a plea bargain.[7]

A determination of what exactly counts as criminally derived "proceeds" under the Act would seem to be vital to determining liability; however, for over two decades, the term "proceeds" was curiously left undefined by the Act itself.[8] This omission left the parameters of the word up for debate in the United States courts of appeals, several of which rendered contradictory

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1 Pub. L. No. 99-570, 100 Stat. 3207-18 (1986) (codified as amended at 18 U.S.C. §§ 1956, 1957 (West 2009)).

2 *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, MONEY LAUNDERING OFFENDERS, 1994–2001 2 (2003), *available at* http://bjsdata.ojp.usdoj.gov/content/pub/pdf/mlo01.pdf [hereinafter DEP'T OF JUSTICE STATISTICS] (citing DEP'T OF JUSTICE, MONEY LAUNDERING STATUTES AND RELATED MATERIALS, ASSET FORFEITURE AND MONEY LAUNDERING SECTION (2002)); *see also* 18 U.S.C. §§ 1956(a)(3), (c)(7).

3 *See* DEP'T OF JUSTICE STATISTICS, *supra* note 2, at 2. For an argument that the Money Laundering Control Act as currently utilized by prosecutors and the courts is too broad, see Elizabeth Johnson & Larry Thompson, *Money Laundering: Business Beware,* 44 ALA. L. REV. 703 (1993). *See also* Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 531 (2000).

4 *See* DEP'T OF JUSTICE STATISTICS, *supra* note 2, at 2; *see also* 18 U.S.C. § 1956(c)(7).

5 *See infra* notes 49 – 55 and accompanying text; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2003).

6 *See infra* notes 56 – 60 and accompanying text; *see also* 18 U.S.C. §§ 981–982 (2006).

7 *See generally* Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 TEMP. POL. & CIV. RTS. L. REV. 517, 534–35 (2005) (noting that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"); *see also* United States v. Santos, 128 S. Ct. 2020, 2026 (2008) (plurality opinion) (noting that with the harsh sentencing guidelines, "[p]rosecutors, of course, would acquire the discretion to charge the lesser [predicate] offense, the greater money-laundering offense, or both — which would predictably be used to induce a plea bargain to the lesser charge.").

8 *See* 18 U.S.C. §§ 1956, 1957 (2006) (lacking any definition of "proceeds"). The Act was amended to include a definition of "proceeds" on May 20, 2009. *See infra* notes 310 – 316 and accompanying text.

decisions.[9] Specifically, disagreement arose over the definition of "proceeds" in the principal money laundering statute, 18 U.S.C. § 1956(a)(1), which criminalizes knowing financial transactions involving unlawfully derived "proceeds" with the intent to promote the SUA, conceal the unlawful source of the "proceeds," or violate tax laws or reporting requirements.[10] Circuits divided over whether the term "proceeds" in this statute included "gross receipts" — the total amount of funds derived from the predicate offense[11] — or was limited to simply "profits" — the revenues left over after the expenses of the predicate offense are paid.[12]

The importance of this seemingly esoteric definitional battle can be seen in the case of Efrain Santos, whose case eventually reached the Supreme Court.[13] Santos operated an illegal gambling business in Indiana that involved using the gamblers' bets to pay the lottery's employees and winners.[14] Utilizing the "gross receipts" definition of "proceeds," the district court found that these payments constituted the offense of promotional money laundering.[15] In contrast, had the "profits" definition been used, these payments would have been considered as mere expenses involved in the substantive offense of operating an illegal gambling business, and Santos would not have been convicted of any money laundering charges.[16]

Santos was ultimately convicted of one count of conspiracy to run an illegal gambling business,[17] one count of running an illegal gambling business,[18] one count of conspiracy to launder money,[19] and two counts of money launder-

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9 *See* discussion *infra* Part II.B.

10 *See* 18 U.S.C. § 1956(a)(1).

11 In various cases and commentary, this "gross receipts" definition of "proceeds" is referred to by several terms (including "gross income," "gross proceeds," "receipts," etc). For the purposes of clarity, this Note changes all references that encompass the "gross receipts" definition to the singular term "gross receipts."

12 In various cases and commentary, this "profits" definition of "proceeds" is referred to by several terms (including "net receipts," "net proceeds," etc). For the purposes of clarity, this Note changes all references that encompass the "profits" definition to the singular term "profits."

13 United States v. Santos, 128 S. Ct. 2020 (2008).

14 *Id.* at 2022–23 (plurality opinion).

15 *Id.* at 2023.

16 *See* United States v. Santos, 342 F. Supp. 2d 781, 798–99 (N.D. Ind. 2004) ("[I]n order for Santos to be guilty of money laundering under [the "profits" definition], the money used by Santos in the financial transactions between himself and his couriers and/or winners for purposes of promoting his gambling business must have derived from the *net* proceeds of his illegal gambling business. . . . [T]he constitution of those proceeds (net versus gross) was never determined. . . . [I]t clearly appears that the proceeds admittedly used by Santos to pay winners and couriers *could only have been gross proceeds* . . . ." (emphasis in original) (citations omitted)); *see also* United States v. Febus, 218 F.3d 784, 789–90 (7th Cir. 2000).

17 *Santos*, 128 S. Ct. at 2023 (plurality opinion) (in violation of 18 U.S.C. § 371).

18 *Id.* (in violation of 18 U.S.C. § 1955).

19 *Id.* (in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), (h)).

ing.[20] Santos was sentenced to sixty months of imprisonment on each of the two gambling counts and 210 months of imprisonment on each of the three money laundering counts, all to be served concurrently.[21] In contrast, had Santos been sentenced under the "profits" definition, he would likely have received a total sentence of just sixty concurrent months for each of the gambling counts.[22] Thus, the use of a "gross receipts" definition of "proceeds" in Santos' case meant that he was sentenced to spend an extra twelve and a half years of his life in federal prison.

The Seventh Circuit was the first to speak directly on this issue.[23] The court maintained that the term "proceeds" only included the "profits" of the underlying offense and argued that to hold otherwise would merge the necessary transactions needed to complete the predicate crime with the separate offense of money laundering, essentially giving two punishments for the same conduct.[24] This approach was subsequently rejected by the First, Third, and Eighth Circuits, which all held the term to include all "gross receipts" from illegal activity.[25]

The United States Supreme Court seemed poised to end the circuit debate when it granted certiorari in the aforementioned case *United States v. Santos*.[26] However, the fractured and acrimonious opinion released by the plurality did little more than muddy the waters. Indisputably, the Court held that "proceeds" means "profits," not "gross receipts," for the predicate crime of operating an unlicensed gambling business.[27] Whether this "profits" definition of "proceeds" extends to the funds derived from other predicate offenses, however, is up for much debate; the decision splintered 4–1–4, with the Justices themselves lobbing numerous verbal barbs disparaging the precedential weight of each other's decisions.[28]

Since the *Santos* decision, district courts have been all over the map in applying the "profits" definition to SUAs outside of the gambling context.[29] Indeed, one court noted that the *Santos* decision "raises as many issues as it re-

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20 *Id.* (in violation of 18 U.S.C. §1956(a)(1)(A)(i)).

21 *Id.*

22 *See supra* note 16 and accompanying text.

23 United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002); *see also* NATHAN REILLY, BUREAU OF NAT'L AFFAIRS, WHITE COLLAR CRIME REPORT, THE MEANING OF MONEY LAUNDERING "PROCEEDS": A CIRCUIT SPLIT RIPE FOR RESOLUTION 2 (March 16, 2007).

24 *Scialabba*, 282 F. 3d at 477.

25 *See* discussion *infra* Part II.B.2.; *see also* United States v. Huber, 404 F.3d 1047 (8th Cir. 2005); United States v. Grasso, 381 F.3d 160 (3d Cir. 2004), *vacated and remanded on other grounds*, 544 U.S. 945 (2005), *reinstated in relevant part*, 197 F. App'x 200 (3d Cir. 2006); United States v. Iacaboni, 363 F.3d 1 (1st Cir. 2004), *cert. denied*, 543 U.S. 978 (2004).

26 128 S. Ct. 2020 (2008).

27 *Id.* at 2034 n.7 (Stevens, J., concurring).

28 *See* discussion *infra* Part III.B.1.e., Part III.B.2., and Part III.B.3.d.

29 *See* discussion *infra* Part IV.

solves for the lower courts."[30] The 111th Congress, in an attempt to clarify the burgeoning judicial problem, responded to *Santos* by quickly voting through the Fraud Enforcement and Recovery Act of 2009 ("FERA") in its first session, with President Obama signing it into law on May 20, 2009.[31] Notably, FERA adds a new paragraph to the Money Laundering Control Act that defines the term "proceeds" to include the "gross receipts" of a specified unlawful activity.[32] However, this amendment does little for the tumultuous state of the law that *Santos* left immediately in its wake; FERA is silent on the issue of retroactivity, and as such it only applies to conduct that occurs after May 20, 2009.[33] However, the passage of this statute has added some interesting layers to the *Santos* debate.[34]

This Note takes stock of the growing circuit split for post-*Santos* cases and classifies the lower court decisions analyzing *Santos* into three categories: Narrow, Moderate, and Broad *Santos.* Narrow *Santos* courts have restricted the application of the "profits" definition to the predicate offense of operating an unlawful gambling business, Moderate *Santos* courts have expanded the "profits" definition to some predicate offenses but not to others, and Broad *Santos* courts have thus far applied the "profits" definition to all Section 1956 predicate offenses. This Note provides a critical look at these three categories and eventually advocates for an adoption of the Broad *Santos* position.

In order to provide some context, Part II of this Note briefly outlines 18 U.S.C. § 1956, the principal money laundering statute at issue in *Santos*, and describes the original circuit split concerning the definition of "proceeds." In Part III, this Note offers a detailed description and analysis of the various opinions in the divided *Santos* case. Finally, in Part IV, this Note categorizes and analyzes the post-*Santos* case law, concluding that a uniform application of the "profits" definition of "proceeds" provides the most equitable and legally sound interpretation of *Santos*.

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30 United States v. Brown, 553 F.3d 768, 783 (5th Cir. 2008).

31 Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617 (2009).

32 *See* 18 U.S.C. § 1956(c)(9) ("[T]he term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, *including the gross receipts of such activity*." (emphasis added)).

33 *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); *see also* United States v. Van Alstyne, 584 F.3d 803, 814 n.12 (9th Cir. 2009) (noting that "Congress subsequently amended the money laundering statute to expressly define proceeds to include gross receipts. . . . Our task, therefore, is to determine how the *Santos* Court would interpret 'proceeds' with respect to mail fraud committed prior to the statute's amendment in May 2009.").

34 *See infra* notes 310–316 and accompanying text.

II. BACKGROUND

While this Note deals exclusively with the issues surrounding the term "proceeds" as it is used in 18 U.S.C. § 1956(a)(1), a brief overview of money laundering laws is helpful. As such, Part II.A of this Note describes the history and scope of the Money Laundering Control Act in general and then outlines Section 1956 in particular, with a focus on the Section's severe penalties. Part II.B then provides a description and analysis of the circuit split that predated the *Santos* case.

A. Relevant Money Laundering Statutes

The Money Laundering Control Act of 1986 was signed into law as part of the Anti-Drug Abuse Act of 1986.[35] This Act, the first direct attack on the offense of money laundering,[36] attempts to curb the use of illicit funds by criminalizing certain transactions involving the "proceeds" of unlawful activity.[37] Since its inception, the purpose and scope of the Money Laundering Control Act have been a point of contention for many legal scholars.[38] Proponents of a narrow interpretation of the Act argue that it was created in the context of the "war on drugs" with the specific purpose of eliminating profits for drug trafficking and organized crime and was not originally meant to be used to "tack on" separate money laundering charges for economic crimes outside of these areas.[39] Supporters of a broader view argue that the Act was meant to criminalize money laundering activity in all of its forms.[40]

Irrespective of this ongoing debate, both the courts and Congress have been slowly expanding the Act's reach. It now covers financial transactions involving the "proceeds" of over 250 underlying predicate offenses and is capable of being applied as an additional charge to almost all economic or white-

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[35] Anti-Drug Abuse Act of 1986, Title I: Subtitle H: Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. §§ 1956–1957 (2006)); *see also* Kelly Neal Carpenter, *Eighth Survey of White Collar Crime: Money Laundering*, 30 AM. CRIM. L. REV. 813, 820 (1993).

[36] Carpenter, *supra* note 35, at 820.

[37] *See* 18 U.S.C. §§ 1956–1957; *see also* Mark A. Provost, *Money Laundering*, 46 AM. CRIM. L. REV. 837, 838 (2009).

[38] For an overview of this debate, see Adams, *supra* note 3, at 545–48.

[39] *See generally id.* at 548 (concluding that the application of the Act surpasses Congress' intention to fight drugs and organized crime); *see also* Johnson & Thompson, *supra* note 3, at 703–04. The defense bar in particular has long been a proponent of a narrowed interpretation and application of the Act. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL), NACDL MONEY LAUNDERING TASK FORCE, NACDL PROPOSALS TO REFORM THE FEDERAL MONEY LAUNDERING STATUTES (Aug. 1, 2001), http://www.criminaljustice.org/public.nsf/legislation/CI_01_018?opendocument [hereinafter NACDL MONEY LAUNDERING TASK FORCE].

[40] *See* Adams, *supra* note 3, at 548.

collar crimes.[41] Indeed, it is extremely rare for a money laundering charge to stand alone; the vast majority of money laundering charges are coupled with at least one other offense, and money laundering often has the most severe penalties of all of the offenses charged.[42]

As described *supra*, the Money Laundering Control Act is codified into two separate sections, 18 U.S.C. §§ 1956 and 1957. Section 1956 generally concerns the *knowing* transaction, transportation, or transfer of unlawfully derived "proceeds."[43] Section 1957 is potentially broader than its counterpart[44] and addresses *all* financial transactions involving unlawfully derived property exceeding $10,000.[45]

Section 1956, the focus of this Note, generally criminalizes three types of activity. Subsection 1956(a)(1) prohibits knowing participation in domestic transactions that involve criminal "proceeds" with the intent to (1) promote the predicate offense ("promotional money laundering"), (2) violate portions of the Internal Revenue Code ("IRC") or avoid reporting requirements, or (3) otherwise conceal the source of the criminal proceeds ("concealment money laundering").[46] Similarly, Subsection 1956(a)(2) forbids the knowing transportation of criminally derived monetary instruments into or through foreign commerce with

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41 *See* DEP'T OF JUSTICE STATISTICS, *supra* note 2, at 2; *see also* 18 U.S.C. § 1956(c)(7).

42 Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 414–15 (2003).

43 Carpenter, *supra* note 35, at 820.

44 *See* 18 U.S.C. § 1957 (2006). Section 1957 is largely beyond the scope of this Note, but see Emily J. Lawrence, *Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957*, 33 B.C. L. REV. 841 (1992) for a discussion of the criticism of Section 1957 for its broad reach.

45 *See* 18 U.S.C. § 1957.

46 18 U.S.C. § 1956(a)(1):

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. . . .

the intent to (1) promote the predicate offense, (2) violate portions of the IRC or avoid reporting requirements, or (3) otherwise conceal the source of the criminal proceeds.[47] Finally, Subsection 1956(a)(3) essentially authorizes the use of covert government operations to expose violations of the statute, as it criminalizes transactions involving what are *represented* to be the proceeds of an unlawful activity.[48]

Violators of Section 1956 find themselves facing some particularly virulent penalties. A defendant sentenced under the statute faces a statutory maximum of up to twenty years' imprisonment and a potential fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater.[49] Under the relevant sentencing guideline, U.S.S.G. § 2S1.1,[50] a Section 1956 conviction also increases the base offense level for the predicate offense by two levels.[51] Moreover, despite the fact that this widely criticized

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47 18 U.S.C. § 1956(a)(2).

48 18 U.S.C. § 1956(a)(3); *see also* Provost, *supra* note 37, at 843.

49 *See* 18 U.S.C. § 1956 ("Whoever [violates this statute] . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.").

50 U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2003):

> (a) Base Offense Level:
>
> (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
>
> (2) **8** plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.
>
> (b) Specific Offense Characteristics
>
> (1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.
>
> (2) (Apply the Greatest):
>
> (A) If the defendant was convicted under 18 U.S.C. § 1957, increase by **1** level.
>
> (B) If the defendant was convicted under 18 U.S.C. § 1956, increase by **2** levels.
>
> (C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by **4** levels.
>
> (3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by **2** levels.

51 *Id.* at § 2S1.1(b)(2)(B).

sentencing guideline[52] was amended in 2001 in order to alleviate disproportionately high sentences[53] and connect the punishment for money laundering more closely to the underlying offense,[54] the addition of a money laundering charge can still result in a greatly increased statutory maximum and a sentence that is much larger than the sentence for the predicate offense.[55]

Money laundering offenses also trigger the broad civil and criminal forfeiture provisions of 18 U.S.C. §§ 981[56] and 982,[57] which permit the forfeiture of property which is "involved in" an attempted or actual financial transaction in violation of the Act.[58] Prosecutors have been able to seize "bank accounts, investment funds, . . . currency, the entire assets of businesses, motor vehicles[,] aircraft[s], [and] real property which is the site of money laundering activity" using these statutes,[59] which are applicable without regard to the magnitude of the money laundering activity or the severity of the underlying offense.[60]

Given the high stakes of a money laundering prosecution, knowledge of the precise conduct that would bring one into the purview of the statute is vital. As Section 1956 criminalizes financial transactions involving the "proceeds" of a SUA, the importance of this term in determining chargeable conduct cannot be overstated.

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52 UNITED STATES SENTENCING COMMISSION, SUMMARY OF FINDINGS: MONEY LAUNDERING WORKING GROUP, http://www.ussc.gov/moneylau/monisum.htm (last visited Feb. 23, 2010).

53 *Id.*

54 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 50, at app. C, vol. II, amend. 634 (2001), reason for amend. (2006) (stating that the guideline was amended in order to "tie[] offense levels for money laundering more closely to the underlying conduct . . .").

55 *See* discussion of the "merger problem," *infra* Part III.B.1.c. Interestingly, although FERA legislatively overruled *Santos*, the "merger problem" remained a concern. *See infra* notes 310–316 and accompanying text.

56 18 U.S.C. § 981 (2006):

> (a)(1) The following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

57 18 U.S.C. § 982 (2006):

> (a) (1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

58 *See* 18 U.S.C. §§ 981, 982.

59 George Chamberlin, *What Is Considered Property "Involved in" Money Laundering Offense, and Thus Subject to Civil or Criminal Forfeiture, for Purposes of Money Laundering Control Act (18 U.S.C.A. § 981(a)(1)(A) and 982(a)(1))*, 135 A.L.R. FED. 367, § 2(a) (originally published in 1996) (citations omitted).

60 NACDL MONEY LAUNDERING TASK FORCE, *supra* note 39.

This Note, as does the *Santos* case, addresses the term "proceeds" as found in 18 U.S.C. § 1956(a)(1),[61] under which the majority of federal money laundering charges are brought.[62] The term "proceeds" is central to two separate elements of Section 1956 offenses. The Government must prove (1) that a transaction "*in fact* involves the proceeds" of a SUA as well as (2) the defendant's *knowledge* that the property involved in the transaction "represents the proceeds" of a SUA.[63]

As discussed *supra*, prior to *Santos* and the subsequent legislative remedy of FERA, the term "proceeds" was nowhere to be found in the definitional section of Section 1956,[64] and the original legislative history's elucidation of the issue is debatable.[65] Thus, the coming circuit split came as little surprise.

B. The Battle Begins: The Original Circuit Split Explained

In 2002, the Seventh Circuit became the first appellate court to directly address the issue of a "gross receipts" vs. "profits" definition of the term "proceeds" in Section 1956. Since then, the First, Third, and Eighth Circuits weighed in on the matter and reached the opposite conclusion. This Part assesses each of these decisions in turn.

1. The Seventh Circuit: "Profits" Rule

In *United States v. Scialabba*,[66] the Seventh Circuit held that Section 1956 only prohibited transactions involving criminal "profits," not transactions involving "[gross] criminal receipts."[67] The *Scialabba* case, like *Santos*[68] after it, involved a defendant that was convicted of running an illegal gambling business.[69] Defendant Scialabba used the money from bettors to compensate winning customers, pay bar and restaurant owners for their assistance, and fix gambling machines.[70] As a result of these transactions, Scialabba and his co-defendant were convicted of promotional money laundering under Section 1956(a)(1)(A)(i).[71]

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61 18 U.S.C. § 1956(a)(1).

62 NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 397 (West 3d ed. 2000).

63 United States v. Santos, 128 S. Ct. 2020, 2023 (2008) (plurality opinion) (citing 18 U.S.C. § 1956(a)(1)).

64 *See* 18 U.S.C. § 1956(c).

65 *Santos*, 128 S. Ct. at 2024 n.3, 2032, 2038, 2040.

66 United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002).

67 *Id.* at 478.

68 *Santos*, 128 S. Ct. at 2022 (plurality opinion).

69 *Scialabba*, 282 F.3d. at 475.

70 *Id.*

71 *Id.*

On appeal to the Seventh Circuit, Scialabba argued that the term "proceeds" in Section 1956(a)(1) referred to only the "profits," not the "gross receipts," of an offense.[72] The Seventh Circuit noted the lack of definitional clarity in the term, as it had been left undefined by both the statute and the courts, and argued that the rule of lenity[73] dictated an adherence to the "profits" definition to "avoid catching people by surprise."[74]

The court also described what was to become known as the "merger problem:" when the predicate crime in question involves business-like operations, the use of a "gross receipts" definition of "proceeds" causes the predicate crime to "merge[] into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance."[75] The court stated,

> If . . . the word "proceeds" is synonymous with gross [receipts], then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.[76]

The court consequently vacated the money laundering convictions of both Scialabba and his co-defendant, finding that their convictions necessarily rested on the incorrect "gross receipts" definition of "proceeds."

2. The First, Third, and Eighth Circuits: "Gross Receipts" Rule

Following the *Scialabba* decision, the First Circuit created a circuit split with its holding in *United States v. Iacaboni*,[77] a case that once again involved a defendant convicted of both illegal gambling and money laundering crimes.[78] The court, asked to re-evaluate the proper amount to be forfeited in relation to the money laundering conviction, upheld the district court's use of the "gross receipts" version of "proceeds."[79] The *Iacaboni* court looked to its previous

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72 *Id.*

73 The rule of lenity states that "when a statute is irreconcilably ambiguous, the tie goes to the defendant." Harvard Law Review Ass'n, *Leading Cases: Federal Statutes and Regulations: Money Laundering: Rule of Lenity*, 122 HARV. L. REV. 475, 475 (2008).

74 *Scialabba*, 282 F.3d at 475.

75 *Id.*

76 *Id.* at 476 (citations omitted).

77 363 F.3d 1 (1st Cir. 2004).

78 *Id.* at 2.

79 *Id.* at 6, 8.

determination of the word "proceeds" as used in the Racketeer Influenced and Corrupt Organizations Act ("RICO").[80] The First Circuit had previously held that the legislative history of the RICO statute indicated that "the term 'proceeds' [in RICO] ha[d] been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving [] profits."[81] The court found this reasoning persuasive and thus held that the "gross receipts" version of "proceeds" in the money laundering statute was the most appropriate. The court also dismissed the "merger problem" addressed by *Scialabba*, determining that the gambling operation and money laundering charges "each requir[e] an element the other does not."[82]

Following the *Iacaboni* decision, the Third Circuit addressed the "proceeds" issue more directly in *United States v. Grasso*.[83] This court also construed the use of "proceeds" in Section 1956 to mean "gross receipts" rather than "profits."[84] The defendant in *Grasso* had been convicted of money laundering based on his fraud scheme's advertising, printing, and mailing expenses: "simply put, [he] paid for his business expenses with the receipts from his sales."[85] Presented with "the many definitions of proceeds and the uncertain value of congressional records in choosing among them," the *Grasso* court looked to the statute itself and decided that the language in Section 1956 that criminalized a financial transaction for the purpose of "promoting" an underlying offense indicated that the reinvestment of an unlawful operation's gross income to sustain itself should be punishable under the statute.[86]

Acknowledging the difficulties of proof involved in a money laundering prosecution under the "profits" definition,[87] the court dismissed the "merger problem," noting previous circuit precedent that indicated that "[Section] 1956 may subject an individual to multiple penalties based on the same crime without violating either double jeopardy or the principles governing statutory interpretation."[88] The decision explicitly stated that *Scialabba* reached an "incorrect re-

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80 *Id.* at 4.

81 *Id.* at 4 (citing United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995)).

82 *Id.* at 6 n.8.

83 381 F.3d 160, 167 (3d Cir. 2004).

84 *Id.*

85 *Id.* at 163.

86 *Id.* at 168–69.

87 *Id.* at 169 n.13.

88 *Id.* at 169. A fuller excerpt of this analysis is helpful:

> In United States v. Conley, 37 F.3d 970, 978–79 (3d Cir.1994), we held that prosecution for both gambling and money laundering did not implicate double jeopardy because the statutory elements of the offenses differ; an individual is guilty of money laundering only if he or she *intended* to conceal or promote unlawful activity. The Seventh Circuit distinguished our decision in *Conley*, suggesting that if "proceeds" is interpreted broadly, the similarity between money laundering and the underlying criminal activity is problematic as a

sult" and thus upheld the defendant's conviction on the basis of the "gross receipts" definition of "proceeds."[89]

Finally, adding heft rather than analysis to the growing debate, the Eighth Circuit in *United States v. Huber*[90] adopted the First Circuit's holding in *Grasso* without comment.[91] The issue of "profit" vs. "gross receipts" thus became ripe for the Supreme Court's review.

III. THE *SANTOS* DECISION

This section of the Note analyzes and describes in detail the *Santos* decision. While the Supreme Court presumably granted certiorari in this case in order to soothe the growing divide in the United States courts of appeals on the issue of a "profits" vs. "gross receipts" definition of "proceeds" in Section 1956, the decision ultimately released by the plurality has caused a great deal of confusion among the lower courts.

A. Background

In 1997, Efrain Santos was convicted for his role in the operation of an illegal gambling business — known as a "bolita" — in East Chicago, Indiana.[92] Santos' bolita involved using portions of the gamblers' bets to both pay his employees (including his co-defendant, Benedicto Diaz) and compensate the bettors.[93] Based on these payments, Santos was convicted on two counts of violating Section 1956(a)(1)(A)(i) of the Money Laundering Control Act, among other crimes.[94]

On his direct appeal to the Seventh Circuit, Santos' argument focused on the "promot[ional]" language in the Section 1956. He argued that "his transactions merely completed the substantive offense of illegal gambling, and did not 'promote the carrying on' of the bolita," as is required to violate Section

> matter of statutory construction. But our Court has resolved the latter issue as well. In United States v. Omoruyi, 260 F.3d 291, 295 (3d Cir.2001), we recognized that "conduct constituting the underlying offense conduct may overlap with the conduct constituting money laundering." An individual may be convicted for money laundering as long as the financial transactions are conducted with proceeds of the illegal transaction and with the intent to promote the underlying offense.

Id.

89 *Grasso*, 381 F.3d at 167.

90 404 F.3d 1047 (8th Cir. 2005).

91 *Id.* at 1058.

92 Santos v. United States, 342 F. Supp. 2d 781, 784 (7th Cir. 2004).

93 United States v. Santos, 128 S. Ct. 2020, 2022–23 (2008) (plurality opinion).

94 *Id.* (citing 18 U.S.C. § 1956(a)(1)(A)(i)). Santos was also convicted of one count of conspiracy to run an illegal gambling business, one count of running an illegal gambling business, and one count of conspiracy to launder money. *See supra* notes 18–21 and accompanying text.

1956(a)(1)(A)(i).[95] The court rejected Santos's argument and affirmed his conviction,[96] reasoning that "promotion" included transactions that merely promote the "continued prosperity of the underlying offense."[97] Santos then filed for a writ of certiorari, but the Supreme Court declined review.[98]

After exhausting his direct appeals, Santos filed a habeas motion under 28 U.S.C. § 2255 collaterally attacking his money laundering convictions.[99] Santos alleged that the Seventh Circuit's *Scialabba*[100] decision, which was decided subsequent to his final judgment, required that his money laundering conviction and his conspiracy to commit money laundering conviction be set aside and that he be resentenced.[101]

The district court agreed that Santos was entitled to the benefit of the *Scialabba* court's interpretation of "proceeds,"[102] concluding that "there exists a distinct possibility that Santos stands convicted of acts the law does not make criminal."[103] The district court thus granted Santos' § 2255 motion, vacated his money laundering convictions, and remanded his case for resentencing.[104]

The government sensed an opportunity to overturn *Scialabba* in light of the intervening circuit decisions that had disagreed with its reasoning.[105] On appeal, however, the Seventh Circuit noted that "only Congress or the Supreme Court can definitely resolve the debate of this ambiguous term,"[106] and upheld *Scia-*

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95 United States v. Febus, 218 F.3d 784, 789 (7th Cir. 2000).

96 *Id.* at 790.

97 *Id.* (quoting United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991)).

98 Santos v. United States, 531 U.S. 1021 (2000) (cert denied).

99 *See* United States v. Santos, 342 F. Supp. 2d 781 (N.D. Ind. 2004). There were three other grounds alleged in his § 2255 petition for relief, but the *Scialabba* argument was found to be the only meritorious one.

100 282 F.3d 475 (2002).

101 *Santos*, 342 F. Supp. 2d at 799.

102 *Id.* at 797.

103 *Id.* at 798–99.

104 *Id.*

> In order for Santos to be guilty of money laundering under [the "profits" definition], the money used by Santos in the financial transactions between himself and his couriers and/or winners for purposes of promoting his illegal gambling business must have been derived from the *net* proceeds of his illegal gambling business . . . the constitution of those proceeds (net versus gross) was never determined. . . . [I]t clearly appears the proceeds admittedly used by Santos to pay winners and couriers *could only have been gross* proceeds. . . .

Id. (emphasis in original).

105 *See* discussion *supra* Part II.B.2.

106 Santos v. United States, 461 F.3d 886, 894 (7th Cir. 2006) (footnote omitted) (alteration in original).

labba and the grant of Santos' § 2255 motion vacating his money laundering convictions.[107] On April 23, 2007, the Supreme Court granted certiorari.[108]

B. The Supreme Court's Obfuscation

In a fractured 4–1–4 split, the Supreme Court proceeded to muddle the definition of "proceeds" in Section 1956(a)(1) even further. Justice Scalia, writing for a four-Justice plurality, advocated a "profits" definition for all predicate offenses.[109] Justice Stevens, writing a sole concurrence that provided the crucial fifth vote for the plurality, held that the Court need not pick a definition of "proceeds" applicable to every predicate offense and that the "profits" definition was at least appropriate for the predicate offense of operating an illegal gambling business.[110] Justice Alito, writing for the four Justices in the primary dissent, argued that the "gross receipts" definition should apply to all predicate offenses.[111] This Part proceeds to examine each of these arguments in detail.

1. The Plurality

a. An Ambiguous Term

Justice Scalia authored the plurality opinion, joined by Justice Souter and Justice Ginsburg, and Justice Thomas joined all but the final section of the opinion. The main thrust of the plurality's argument was essentially a routine utilization of the ordinary principles of statutory construction. First, Justice Scalia noted the lack of a statutory definition of "proceeds" in Section 1956.[112] Second, Justice Scalia found that attempting to give the term its "ordinary meaning"[113] was futile, as both "gross receipts" and "profits" are ordinarily used and accepted definitions of "proceeds."[114] Third, Justice Scalia looked to the common meaning of "proceeds" in the Federal Criminal Code, noting that while the

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107 *Id.*

108 United States v. Santos, 127 S. Ct. 2098 (2007).

109 Justice Scalia was joined by Justice Souter, Justice Thomas, and Justice Ginsburg for Parts I–III and V of his opinion. United States v. Santos, 128 S. Ct. 2020, 2023–31 (2008) (plurality opinion). Part IV was only joined by Justice Souter and Justice Ginsburg. *Id.* at 2030–31.

110 *See id.* at 2031–34 (Stevens, J., concurring)

111 Justice Alito was joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer. *Id.* at 2035–45 (Alito, J., dissenting). Justice Breyer also filed a brief dissent. *Id.* at 2034–35 (Breyer, J., dissenting).

112 *Santos*, 128 S.Ct. at 2024 (plurality opinion).

113 *Id.* at 2024 (citing Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)).

114 *Id.* (citing OXFORD ENGLISH LANGUAGE DICTIONARY 544 (2d ed. 1989) and WEBSTER'S NEW INTERNATIONAL DICTIONARY 1972 (2d ed. 1957)). Justice Scalia rejected the government's argument that the "gross receipts" operates as the primary definition, noting that "any preference [given by secondary sources] is too slight for us to conclude that '[gross] receipts' is the *primary* meaning of 'proceeds.'" *Id.*

term was largely left undefined,[115] the provisions that had defined "proceeds" included both the "gross receipts" and the "profits" definitions,[116] and as such, there was no common statutory meaning of the term. Finally, the plurality considered the term "proceeds" contextually within Section 1956 itself,[117] noting that all appearances of the term "leave the ambiguity intact"[118] and arguing that the statute made sense under either definition.[119]

Finding the legislative history of the statute "totally unenlightening,"[120] Justice Scalia finally concluded that "there is no more reason to think that 'proceeds' means '[gross] receipts' than there is to think that 'proceeds' means 'profits.'"[121] Section 1956's use of "proceeds," as described by the plurality, was helplessly ambiguous.

b. The Role of the Rule of Lenity

In an interesting move,[122] Justice Scalia then proceeded to use to the rule of lenity to break the tie between the two competing interpretations. Concluding that "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition," he insisted that the narrower definition was the proper one, declaring that "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[123]

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115 *Id.* at 2024 (noting that "proceeds" is undefined in 18 U.S.C. § 1963 and 21 U.S.C. § 853).

116 *Id.* (noting that 18 U.S.C. § 2339C(e)(3) (2000) and 18 U.S.C. § 981 (2000) both define the term to mean receipts, but 18 U.S.C. § 981(a)(2)(B) (2000) defines the term to include "profits").

117 *Id.* (citing United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988)).

118 *Santos*, 128 S.Ct. at 2024 (plurality opinion).

119 *Id.* The plurality also dismissed Justice Alito's point that "14 states that use *and define* the 'proceeds' in their money laundering statutes, the Model Money Laundering Act, and an international treaty on the subject, all define the term to include gross receipts," noting that "[m]ost of the state laws cited by the dissent, the Model Act, and the treaty postdate the 1986 federal money-laundering statute by several years . . . [i]f anything, they show that "proceeds" is ambiguous and that others . . . sought to clarify the ambiguity." *Id.* at 2024–25 (citations omitted, footnote omitted).

120 *Id.* at 2025 n.3.

121 *Id.* at 2025.

122 *See* Harvard Law Review Ass'n, *supra* note 73, at 477–84. This Article notes that before *Santos*, the rule of lenity was becoming "increasingly limited, both in scope and application" and hypothesizes that the Court's willingness to use the rule of lenity in this instance "indicate[s] that judges should not be as reluctant to reach ambiguity, or to use lenity as the primary reason for the decision, as they have been in the past few decades." *Id.* at 482. Indeed, the number of cases citing *Santos* for its discussion of the rule of lenity are growing in number every day. *See, e.g.*, United States v. Miranda Lopez, 532 F.3d 1034, 1040 (9th Cir. 2008) (taking note of *Santos* and applying the rule of lenity to an ambiguous statute).

123 *Santos,* 128 S. Ct. at 2025 (plurality opinion).

c. The Merger Problem

Justice Scalia also addressed the "merger problem" that had so troubled the Seventh Circuit in both *Scialabba* and *Santos*.[124] He argued that, under the "gross receipts" definition, "nearly every violation of the illegal lottery statute would also be a violation of the money-laundering statute because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery."[125] As presumably few lotteries would make the dubious economic move of refusing to pay their winners, Section 1956 "merges" with the statute criminalizing illegal lotteries.[126]

The plurality expressed concern over the extreme sentencing disparity created by Santos' particular merger.[127] The statutory maximum sentence for a violation of the illegal lottery statute is five years, but as a result of the aforementioned "merger" with the money laundering statute, defendants face an extra fifteen years added to their statutory maximum for the same activities.[128] Justice Scalia also warned that this phenomenon was not limited to the illegal gambling operations, as many white-collar crimes involve similar business-like costs.[129] As "profits" are the funds that are left over after the expenses of the predicate offense are paid, the plurality argued that this narrowed interpretation of "proceeds" would eliminate the double liability for payments that are a necessary part of the predicate offense.[130]

d. Problems of Proof and Accounting

Justice Scalia also addressed perhaps the most practical concern of the government: the problems of proof and accounting that would emerge from the narrowed definition of "proceeds." The government's argument was essentially that, as prosecutors had to prove (1) that a transaction "*in fact* involves the proceeds" of a SUA as well as (2) the defendant's *knowledge* that the property involved in the transaction "represents the proceeds" of a SUA,[131] the utilization of the "profits" definition would require proof that is much more difficult to obtain.[132]

The plurality dismissed this argument with the rule of lenity, dryly stating that "[w]e interpret ambiguous criminal statutes in favor of defendants, not

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124 *See* discussion *supra* Part II.B.1.

125 *Santos,* 128 S. Ct. at 2026 (plurality opinion).

126 *Id.*

127 See discussion *supra* Part II.A.

128 *Santos,* 128 S. Ct. at 2026 (plurality opinion); *see also* 18 U.S.C. § 1956(a)(1) (2000).

129 *Santos,* 128 S. Ct. at 2026 (plurality opinion).

130 *Id.* at 2027.

131 *Id.* at 2023 n.1 (citing 18 U.S.C. § 1956(a)(1)).

132 *Id.* at 2028; *see also* Petition for Writ of Certiorari at 15–18, *Santos*, U.S. (No. 06-1005).

prosecutors"[133] and noting that several other criminal statutes required proof of "profits."[134] To provide some direction in proving the elements of a Section 1956 offense using "profits," the plurality advocated a "single instance test":

> To establish the proceeds element under the "profits" interpretation, the prosecution needs to show only that a single instance of specified unlawful activity was (1) profitable and (2) gave rise to the money involved in a charged transaction. Government can select the instances in which profitability is the strongest.[135]

e. Stare Decisis

Justice Scalia concluded the plurality's opinion with a final section devoted entirely to attacking Justice Stevens' limiting concurrence.[136] Justice Stevens' opinion advocates interpreting "proceeds" to mean "profits" for some predicate crimes (such as an illegal gambling offense) and "gross receipts" for others,[137] a prospect that Justice Scalia evidently found unpalatable. This section of the plurality's opinion lost the support of Justice Thomas; thus, only Justices Souter and Ginsburg concurred with Justice Scalia's strong rebuke.

Justice Scalia forcefully argued that Justice Stevens' attempt to "giv[e] the same word, *in the same statutory provision*, different meanings *in different factual contexts*"[138] was explicitly rejected by Supreme Court precedent, citing *Clark v. Martinez* for the proposition that "the meaning of words in a statute cannot change with the statute's application."[139]

While acknowledging that, as the deciding vote, the concurrence officially limited the plurality's opinion, Justice Scalia added:

> The narrowness of [Justice Stevens' holding] consists of finding "proceeds" means "profits" when there is no legislative history to the contrary. That is all our judgment holds. It does not hold that the outcome is different when a contrary legislative history does exist. Justice Stevens' speculations on that point address a

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133 *Santos,* 128 S. Ct. at 2028 (plurality opinion).

134 *Id.* at 2028 (noting that both 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a) require a determination of "gross profits or other proceeds").

135 *Id.* at 2029.

136 *Id.* at 2030–31.

137 *See* discussion *infra* Part III.B.2.

138 *Santos,* 128 S. Ct. at 2030 (plurality opinion).

139 *Id.* at 2030 (citing Clark v. Martinez, 543 U.S. 371, 379 (2005)).

> case that is not before him, are the purest of dicta, and form no part of today's holding.[140]

Justice Scalia then finished his opinion with a flourish, sending out a warning to counsel advocating Justice Stevens' narrowed position: "[n]ot only do the Justices joining this opinion reject [Justice Stevens'] view, but also (apparently) so do the justices joining the principal dissent."[141]

2. Justice Stevens' Key Concurrence

As the fifth vote, Justice Stevens' narrower concurring opinion limited the Court's holding.[142] Noting the lack of legislative history regarding the "proceeds" of an illegal gambling business and arguing that the application of the "receipts" definition to this particular predicate offense would lead to a "perverse result," Justice Stevens agreed with the plurality's holding that "proceeds" means "profits" in the context of an illegal gambling business.[143]

Justice Stevens argued that the term "proceeds" could have different definitions, meaning either "profits" or "gross receipts," when applied to each of the varied predicate offenses for money laundering.[144] Noting that "although it did not do so, it seems clear that Congress could have provided that the term 'proceeds' shall have one meaning when referring to some specified unlawful activities and a different meaning when referring to others,"[145] he found no reason why a court should not be able to make the same interpretational leap.[146] Justice Stevens also voiced concern about the "merger" problem, noting that the treatment of a "mere payment of expense of operating an illegal gambling business" as a separate money laundering charge was the equivalent of a double

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140 *Id.* at 2031.

141 *Id.* (citing *id.* at 2036, 2044 (Alito, J., dissenting)).

142 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

143 *Santos*, 128 S. Ct. at 2033–34 (Stevens, J., concurring).

144 *Id.* at 2034, n.7.

145 *Id.* at 2032. Justice Stevens noted that the Congress had done precisely this in the general civil forfeiture statute, § 981:

> In . . . § 981, Congress did provide two different definitions of "proceeds," recognizing that — for a subset of activities — "proceeds" must allow for the deduction of costs. Compare §981(a)(2)(A)(2000 ed.) (defining "proceeds in cases involving illegal goods and services to mean 'property of any kind obtained directly or indirectly . . . not limited to the net gain or profit realized from the offense") with § 981(a)(2)(B) (defining 'proceeds' with respect to lawful goods sold in an illegal manner as the amount of money acquired 'less the direct costs incurred in providing the goods or services').

Id. at 2031–32.

146 *Id.* at 2032.

jeopardy violation. [147] At least for illegal gambling offenses, Stevens held the rule of lenity could not allow such a "perverse result." [148]

However, in a key point, Justice Stevens agreed with dissenting Justice Alito's argument that "the legislative history of Section 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales."[149] Thus, Justice Alito's argument that "proceeds" is intended to mean "gross receipts" in the context of Section 1956 for drug sales and organized crime, the "heartland" activities prohibited by the statute,[150] garnered five votes.[151]

Justice Stevens disagreed with Justice Scalia's characterization of the *stare decisis* effect of the opinion, arguing that his "conclusion rests on [his] conviction that Congress could not have intended the *perverse result* that the dissent's rule would produce if its definition were applied to the operation of an unlicensed gambling business." [152] Where other applications of the statute do not result in such a "perverse result," Justice Stevens "would presume that the legislative history summarized by Justice Alito reflects the intent of the enacting Congress."[153]

3. Justice Alito's Principal Dissent

Justice Alito authored the principal dissent, joined by the Chief Justice, Justice Kennedy, and Justice Breyer. [154] The dissent found that the plurality's

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147 *Id.* at 2033.

148 *Id.*

149 *Santos*, 128 S.Ct. at 2032 (Stevens, J., concurring).

150 *See id.* at 2039–40 (Alito, J., dissenting):

> The federal money laundering statute was enacted in the wake of an influential report by the President's Commission on Organized Crime that focused squarely on criminal enterprises of this type. See Interim Report 7-8 (described in S. Rep. No. 99-433, pp. 2–4 (1986) (hereinafter S. Rep.) and H.R. Rep., at 16). The Commission identified drug traffickers and other organized criminal groups as presenting the most serious problems. . . . Following the issuance of the Interim Report, Congress turned its attention to the problem of money laundering, and much of the discussion focused on the need to prevent laundering by drug and organized crime syndicates. See, *e.g.*, S. Rep., at 3 [], 4 ("Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking" []).

151 *See id.* at 2032, 2035 n.1.

152 *Id.* at 2034 n.7 (Stevens, J., concurring) (emphasis added).

153 *Id.* Briefly, Justice Stevens also claimed that *Clark v. Martinez* did not preclude his argument because of the "compelling reasons" in *Santos* to have oscillating statutory definitions. *Id.* at 2032.

154 Justice Breyer, who also joined Justice Alito's dissent, filed a brief dissent in which he primarily focused on the "merger problem" discussed *supra*. Instead of changing the definition of "proceeds" as advocated by the plurality to correct the problem, Justice Breyer suggested that, as

interpretation "[1] frustrated Congress' intent and [2] maim[ed] a statute that was enacted as an important defense against organized criminal enterprises," particularly organized crime and drug trafficking.[155] In contrast to both the plurality and Justice Stevens, the four dissenters wished to define "proceeds" as "gross receipts" for all predicate offenses.

a. An Ambiguous Term

The dissent, paralleling Justice Scalia's textual analysis of the term "proceeds," argued that the plurality had not focused enough attention on the term's location in the context of a money laundering statute and had thus inappropriately resorted to the rule of lenity.[156] Citing an international treaty,[157] the Model Money Laundering Act,[158] and several state statutes[159] that all define "proceeds" in a way that encompasses "gross receipts," the dissent argued that this trend indicated that such laws "customarily mean for the term to reach all receipts and not just profits."[160]

Far from finding the legislative history "totally unenlightening,"[161] Justice Alito made much of the fact that the original version of the money laundering statute passed by the House included the term "criminally derived property," a phrase commonly understood to include gross receipts.[162] The bill passed by the Senate simply said "proceeds,"[163] and the House acceded to that version.[164] Justice Alito argued that "there is no suggestion in the legislative history that the term 'criminally deprived property' and the term 'proceeds' were perceived as having different meanings."[165] As he found the statute to have "reasonable

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the problem was "essentially a problem of fairness in sentencing," the Sentencing Commission should address it. *Santos*, 128 S.Ct. at 2034 (Breyer, J., dissenting).

155 *Id.* at 2036 (Alito, J., dissenting).

156 *Id.* at 2036–37.

157 *Id.* at 2036 (noting that the United Nations Convention Against Transnational Organized Crime defines "proceeds" to mean "any property derived from or obtained, directly or indirectly, through the commission of an offense").

158 *Id.* at 2036 (noting that the Model Money Laundering Act defines "proceeds" as "property acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission . . .").

159 *Id.*

160 *Santos*, 128 S.Ct. at 2037 (Alito, J., dissenting).

161 *Id.* at 2025 n.3 (plurality opinion).

162 *Id.* at 2037 (Alito, J., dissenting).

163 S. 2683, 99th Cong. § 2(a) (1986).

164 H.R. 5484, 99th Cong. (1986).

165 *Santos,* 128 S. Ct. at 2037 n.5 (Alito, J., dissenting). *But see id.* at 2025 n.3 (plurality opinion) (Justice Scalia was extremely critical of this position, because "we have no idea why the earlier House terminology was rejected — because "proceeds" captured the same meaning, or because "proceeds" captured a narrower meaning?").

clarity" in light of this legislative history, Justice Alito held that the rule of lenity was inapplicable.[166]

b. The "Merger Problem"

Though acknowledging the severity of the "merger problem" as described by the plurality,[167] the dissent argued that it was limited to a select number of cases[168] and should be remedied by the Sentencing Commission.[169]

c. Problems of Proof and Accounting

The primary concern of the dissent rested on the "pointless and difficult problems of proof"[170] involved in proving the statutory elements of Section 1956 under a "profits" definition.[171] Justice Alito argued that knowledge of "profits" would be exceedingly hard to prove in the case of a professional money launderer[172] and that special accounting rules would have to be developed to discern the profitability of the often murky world of criminal enterprises.[173] Justice Alito primarily focused on drug sales and organized crime, arguing that "[t]racing funds back to particular drug sales and proving that these sales were profitable will often prove impossible."[174] He then stressed that these problems were not limited to organized crime and contraband, but would also extend to the white-collar crimes, such as fraud, that are routinely prosecuted under the money laundering statute.[175]

d. Stare Decisis

The dissent explicitly disagreed with Justice Stevens' concurrence; Justice Alito explained, "I do not see how the meaning of the term 'proceeds' can vary depending on the nature of the illegal activity that produced the laundered funds."[176] The dissent was cheered, however, by Justice Stevens' agreement

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166 *Santos*, 128 S.Ct. at 2045 (Alito, J., dissenting).

167 *Id.* at 2044.

168 *Id.*

169 *Id.* The dissent also claimed that the "merger problem" was exacerbated by the Seventh Circuit's interpretation of the "promotion[al]" language of Section 1956, which was not up for review. *See* discussion *supra* Part II.B.1.

170 *Id.* at 2038.

171 *Id.*

172 *Santos*, 128 S.Ct. at 2039 (Alito, J., dissenting).

173 *Id.* at 2040.

174 *Id.* (citing United States v. Bajackajian, 524 U.S. 321, 351–52 (1998)).

175 *Id.* at 2043.

176 *Id.* at 2044.

that proceeds included "gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales."[177] In a pointed message, the dissent noted that "five justices agree with the [aforementioned] position taken by Justice Stevens."[178]

IV. MONEY LAUNDERING AFTER *SANTOS*: A STATE OF FLUX

Since *Santos* was released,[179] courts throughout the country have been trying to make sense of the fractured decision, particularly the heated debate concerning its precedential value. The law at this point is still developing, but the post-*Santos* decisions concerning the application of the "profits" definition to predicate offenses other than gambling can be grouped into roughly three categories. This Part analyzes the current decisions on this issue and classifies them as Narrow, Moderate, or Broad *Santos* courts. Narrow *Santos* courts have restricted the application of the "profits" definition to gambling, Moderate *Santos* courts have expanded the "profits" definition to some predicate offenses but not to others, and Broad *Santos* courts have to date applied the "profits" definition to all Section 1956 predicate offenses. After describing the different categories, this Part takes a critical look at the Narrow and Moderate *Santos* positions and advocates for an adoption of the Broad *Santos* position.

A. Narrow Santos*: A Critical View*

Thus far, both the Fourth Circuit,[180] in an unpublished opinion,[181] and the Eleventh Circuit[182] Courts of Appeals are joined by several district courts[183]

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177 *Id.* at 2032 (Stevens, J., concurring).

178 *Santos*, 128 S.Ct. at 2036 n.1 (Alito, J., dissenting).

179 This decision came down on June 2, 2008.

180 United States v. Howard, 309 Fed. App'x. 760, 771 (4th Cir. 2009) ("Because *Santos* does not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge, we are bound by this Court's precedent establishing that 'proceeds' means 'receipts.'").

181 Unpublished decisions in the Fourth Circuit have extremely limited precedential value. *See* Local Rules of the Fourth Circuit Rule 32.1 ("Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). Regardless, as the *Howard* decision is the only Fourth Circuit opinion addressing the *Santos* problem, the lower courts in this district have almost uniformly fallen in line. *See, e.g.*, King v. United States, No. 6:08-cv-01260, 2009 WL 4884362, at *4 (S.D.W.Va. Dec. 10, 2009). There is, however, one notable exception to this rule; a district court in Virginia has resoundingly rejected the *Howard* court's reasoning and adopted a moderate *Santos* position. *See* United States v. Smith, 623 F. Supp. 2d 693, 702 (W.D.Va. 2009).

> Th[is] court believes that *Santos* stands for the proposition that, as a matter of law, the revenue generated by a specified unlawful activity used in a financial transaction to pay the essential expenses of operating that same illegal business cannot constitute 'proceeds' under the money laundering statute, if the

in an extremely constricted view of the *Santos* decision, and as such this Note characterizes them as "Narrow *Santos*" courts. These courts have limited the application of the "profits" definition in section 1956(a)(1) solely to the predicate offense of unlawful gambling operations. This Part explains the two separate rationales that underlie the Narrow *Santos* courts' decisions and provides criticism for their positions.

1. The *Marks* Rule

The Narrow *Santos* courts generally rely on a time-tested principle of *stare decisis*: when the Supreme Court is fractured such that "no single rationale explaining the result enjoys the assent of five Justices," the Court's holding is limited to the narrowest concurrence (the "*Marks* rule"). [184] Even Justice Scalia noted that "[s]ince [Justice Stevens'] vote is necessary to our judgment, and

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> penalties for money laundering are substantially more severe than those for the underlying specified unlawful activity.

Id.

[182] United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir. 2009) ("*Santos* has limited precedential value. . . . [t]he narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956 . . . .").

[183] *See, e.g.*, Acosta v. United States, --- F.Supp.2d ----, 2009 WL 5245634, at *2 (S.D.N.Y. Dec. 31, 2009) ("The proceeds from Acosta's money laundering activities derived from illegal narcotics, not gambling, such as was the case in *Santos.* Circuit Courts which have addressed the issue have narrowed *Santos* to its facts and have drawn this distinction."); Marrero v. United States, --- F.Supp.2d ----, 2009 WL 3179612, at *8 (S.D.Fla. 2009) ("The definition of proceeds in *Santos* must therefore be interpreted to mean profits only where the underlying transactions involve the operation of an illegal gambling business."); United States v. Darui, 614 F.Supp.2d 25, 28 (D.D.C. 2009) (noting that "it appears that when Justice Scalia's and Justice Stevens' opinions are read together, *Santos* defines 'proceeds' as 'profits' only in the context of the illegal gambling operation."); United States v. Sims, Nos. H-98-169, 08-3135, 2009 WL 1158847, at *3 (S.D. Tex. Apr. 29 2009) ("[*Santos*] should only be viewed as standing for the proposition that the 'proceeds' of an illegal gambling operation must, for purposes of the money laundering statute, be profits, not merely receipts."); United States v. Peters, 257 F.R.D. 377, 388 (W.D.N.Y. March 19, 2009) ("[*Santos*] must be read as limited to its facts . . . ."); Gotti v. United States, No. 08-CV-2664 (FB), 2009 WL 197132, at *3 (E.D.N.Y. Jan. 28, 2009) (holding that *Santos* is limited to its facts and "stands only for the proposition that the money laundering statute does not make criminal the use of the revenue from an illegal gambling operation to pay for the expenses involved in running the operation"); Bull v. United States, Nos. CV 08-4191 CAS, CR 04-402 CAS, 2008 WL 5103227, at *7 (C.D. Cal Dec. 3, 2008) (holding in a section 2255 habeas proceeding for money laundering predicated on the offense of drug distribution that *Santos* is limited to its facts); United States v. Prince, No. 04-20223-JPM, 2008 WL 4861296, at *7 (W.D. Tenn, Nov. 7, 2008) ("This Court continues to apply the '[gross] receipts' definition of 'proceeds' in cases like this one, in which the specified unlawful activity is health care fraud."); United States v. Orosco, 575 F.Supp.2d 1214, 1218 (D.Colo. 2008) (holding *Santos* limited to its facts and finding "that *Santos* left Tenth Circuit law pertaining to the proper interpretation of 'proceeds' in the federal money laundering statute undisturbed at least when the underlying SUA is some act other than illegal gambling," then finding no Tenth Circuit case law on the issue and reserving judgment).

[184] Marks v. United States, 430 U.S. 188, 193 (1977).

since his opinion rests upon the narrower ground, the Court's holding is limited accordingly."[185] Ironically enough, this means that Justice Stevens' position, explicitly rejected by seven members of the Court and joined by no one, could become the rule of the land.[186]

Both the Fourth and Eleventh Circuits have explicitly used the *Marks* rule to justify their limited take on *Santos*. The Fourth Circuit noted,

> [T]he holding of the [Supreme] Court for precedential purposes is the narrowest holding that garnered five votes. Justice Stevens's concurrence provides the narrowest holding. Justice Stevens writes that the 'profits' definition of 'proceeds' is limited to money laundering cases involving a gambling operation like the one in that case.[187]

Following suit, the Eleventh Circuit cited *Marks* while arguing that "[t]he narrow [*Marks*] holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds . . .'" and went on to hold that the *Santos* plurality's "profits" definition did not apply to laundering the proceeds of drug trafficking.[188] Both of these decisions thus retained circuit precedent regarding the definition of "proceeds" as "gross receipts" for predicate offenses other than illegal gambling.[189]

There is, however, a major problem with the approach taken in these cases: Justice Stevens did not simply hold that "proceeds" means "profits" for the predicate offense of operating an illegal gambling business. To the contrary,

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[185] United States v. Santos, 128 S.Ct. 2020, 2031 (2008) (plurality opinion) (citing *Marks*, 430 U.S. at 193).

[186] Seven members of the Court explicitly rejected that the meaning of the term "proceeds" could vary based on the factual context of the offense. *See id.* at 2030 (plurality opinion) (Justice Scalia, joined by Justices Souter and Ginsburg, cites Clark v. Martinez, 543 U.S. 371 (2005), for the proposition that "the meaning of words in a statute cannot change with the statute's application."); *see also id.* at 2035–36 (Alito, J., dissenting) (Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer, notes that "I cannot agree with Justice Stevens' approach insofar as it holds that the meaning of the term 'proceeds' varies depending on the nature of the illegal activity that produces the laundered funds.").

[187] United States v. Howard, 309 Fed. App'x. 760, 771 (4th Cir. 2009) (internal citations omitted).

[188] United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir. 2009).

[189] *See Howard*, 309 Fed. App'x. at 771 ("Because Santos does not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge, we are bound by this Court's precedent establishing that 'proceeds' means 'receipts.'"). Additionally, as the Eleventh Circuit in *Demarest* essentially limited the *Santos* decision to its facts, district courts in that circuit have been using the prior "gross receipts" definition for SUAs including Medicare fraud and unlawful distribution of controlled substances. *See* Arnaiz v. Hickey, No. CV208-97, 2009 WL 2971638, at *3 (S.D. Ga. Sep 16, 2009) (Medicare fraud); United States v. Kelley, No. 08-00327-CG, 2009 WL 2382752, at *4 (S.D.Ala. July 29, 2009) (distribution of controlled substances).

he argued that rule of lenity applied to section 1956 when the "merger problem" created a "perverse result" that Congress "could not have intended," such as in the case of an illegal gambling operation.[190] In "other applications of the statute *not involving such a perverse result*," he assumed that the legislative history indicated that the "gross receipts" definition should be used.[191] Thus, it seems that a court truly accepting the *Marks* rule, and Justice Stevens' approach, would have to apply something akin to an ad hoc "perverse results" test for separate predicate offenses, one that takes into account the "merger problem" as well as any relevant legislative history — a complication that the Moderate *Santos* courts are currently struggling with.[192]

2. The *Marks* Rule Rejected: *Alcan Aluminum Corp.*

Perhaps in an attempt to avoid the thorny issue of Justice Stevens' "perverse results" test, several other Narrow *Santos* courts have added another step to their *stare decisis* analysis.[193] These courts look to the interpretive principles espoused in the Second Circuit case *United States v. Alcan Aluminum Corp.*[194] and its progeny for the proposition that the *Marks* rule becomes inapplicable when the narrowest concurring opinion explicitly rejects the plurality's reasoning and does not represent a "common denominator [of] the position approved by at least five justices."[195] In such a case, there is no "law of the land" and the decision is limited to its facts.[196] These courts argue that Justice Scalia's plurality and Justice Stevens' concurrence used divergent reasoning, and as such, the *Santos* holding is limited to the specific, fact-based result of defining "proceeds" as "profits" for the predicate offense of operating an illegal gambling busi-

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190 United States v. Santos, 128 S.Ct. 2020, 2033 (2008) (Stevens, J., dissenting).

191 *Id.* at 2034 n.7 (emphasis added). Specifically, Justice Stevens mentioned that there was no elucidating legislative history for the predicate offense section 541 "Entry of False Goods Classified." *Id.* at 2032.

192 See discussion of Moderate *Santos* cases *infra* Part IV.B.

193 *See, e.g.*, Davis v. Grondolsky, No. 09-2882 (RMB), 2010 WL 503026, at *6 n.5 (D.N.J. 2010); Marrero v. United States, --- F. Supp. 2d ----, 2009 WL 3179612, at *8 (S.D.Fla. 2009); Wooten v. Cauley, No. 09-CV-67-HRW, 2009 WL 3834093, at *6 (E.D.Ky. Nov. 16, 2009); Gamboa v. Norwood, No. CV 09-0656-DSF(RC), 2009 WL 482304, at *3 n.4 (C.D.Cal. Feb. 23, 2009); Gotti v. United States, No. 08-CV-2664 (FB), 2009 WL 197132, at *3 (E.D.N.Y. Jan 28, 2009); Bull v. United States, Nos. CV 08-4191 CAS, CR 04-402 CAS, 2008 WL 5103227, at *7 (C.D. Cal Dec. 03, 2008); United States v. Orosco, 575 F.Supp.2d 1214, 1215 (D.Colo. 2008).

194 United States v. Alcan Aluminum Corp., 315 F.3d 179 (2d Cir. 2003). Although *Alcan Aluminum Corp.* seems to be the most cited case by post-*Santos* courts on this issue, the principles contained in that case have originated elsewhere. *See, e.g.*, Anker Energy Corp. v. Consol. Coal Co., 177 F.3d 161, 169-170 (3d Cir. 1999) (citing cases).

195 *Alcan Aluminum Corp.* 315 F.3d at 189 (quoting King v. Palmer, 950 F.2d 771, 781 (D.C.Cir.1991) (en banc)).

196 *Id.*

ness.[197] Accordingly, these courts hold that their individual circuit precedent on the "proceeds" issue applies for every other predicate offense.

Unfortunately, this approach also gives rise to serious problems. These courts are stretching the principles of *Alcan Aluminum Corp.* almost indistinguishably in their attempts to avoid a broader application of *Santos*. In *Alcan* itself, for example, the Second Circuit analyzed the *stare decisis* effect of the Supreme Court case *Eastern Enterprises v. Apfel*,[198] a plurality decision that declared a statute unconstitutional. In that case, four justices voted to strike down the statute using a Takings Clause analysis.[199] The necessary fifth justice specifically rejected the use of the Takings Clause, instead declaring the statute unconstitutional under substantive due process.[200] Thus, the Second Circuit found that the "substantive due process reasoning . . . is not a *logical subset* of the plurality's Takings analysis, [and] no 'common denominator' can be said to exist among the Court's opinions."[201]

The situation in *Santos* is nowhere near so clean-cut. Far from following a completely different doctrine or explicitly rejecting the plurality, Justice Stevens plainly stated that he found the plurality's determination of the applicability of the rule of lenity in the gambling context "surely persuasive," and he also engaged in a lengthy analysis of the "merger problem," even writing that the plurality's "merger" analysis "dovetails with what common sense and the rule of lenity would require."[202]

Essentially, Justice Stevens' opinion relied on (1) the lack of legislative history elucidating the definition of the ambiguous term "proceeds" for the predicate offense of operating an unlicensed gambling business,[203] (2) the "merger problem" and the "perverse result" that would occur if the money laundering charges stemming from the gambling convictions were allowed to stand,[204] and (3) the application of the rule of lenity to avoid that perverse result.[205] Justice Scalia's plurality decision essentially follows the exact same pattern, but finds the legislative history "unenlightening" for all predicate offenses, not just gambling, and argues that only one definition of "proceeds" can stand,[206] thus apply-

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197 *Davis*, 2010 WL 503026, at *6 n.5 (using *Alcan Aluminum Corp.* to limit *Santos* to its facts); *Marrero*, 2009 WL 3179612, at *8 (same); *Wooten*, 2009 WL 3834093, at *6 (same); *Gamboa*, 2009 WL 482304, at *3 n.4 (same); *Gotti*, 2009 WL 197132, at *3 (same); *Bull*, 2008 WL 5103227 at *7, (same); *Orosco*, 575 F. Supp. 2d at 1215 (same).

198 524 U.S. 498 (1998).

199 *Id.* at 537.

200 *Id.* at 539, 550.

201 United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (emphasis added).

202 United States v. Santos, 128 S. Ct. 2020, 2033 (2008) (Stevens, J., concurring).

203 *Id.* at 2032.

204 *Id.* at 2033.

205 *Id.* at 2033–34.

206 *Id.* at 2030 (plurality opinion).

ing the rule of lenity more expansively than Justice Stevens.[207] This, however, does not change the fact that Stevens' opinion is "a logical subset" of the plurality decision, as it uses an extremely similar chain of reasoning and ends up embracing precisely the ideas that the plurality puts forward, albeit more narrowly.[208] Therefore, the reliance on the principles of *Apfel* by these courts is misplaced.

3. The *Clark v. Martinez* Problem

Finally, even if the Narrow *Santos* courts' analysis relying on *Apfel* and the *Marks* rule could be considered correct, there are still severe difficulties that arise when one considers the binding Supreme Court precedent of *Clark v. Martinez*,[209] which held that "the meaning of words in a statute cannot change with the statute's application."[210] Despite the technically limited nature of the *Santos* holding that is inevitable under the *Marks* rule, Justice Scalia was very specific about the intended effect of his opinion, insisting that counsel choosing to argue for the "gross receipts" definition after *Santos* be prepared to "explain why it doesn't overrule *Clark v. Martinez*."[211]

In *Martinez*, the Supreme Court was faced with interpreting the words "may be detained" in 8 U.S.C. § 1231(a)(6), a statute concerning alien detention.[212] The statute covered three categories of aliens:

> (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk.[213]

The Court had already held that a Category 2 alien could only be detained as long as "reasonably necessary" to remove them from the country.[214] The *Martinez* case involved a Category 1 alien.[215] The Supreme Court held the "reasonably necessary" interpretation of "may be detained" that had been utilized for

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207 *Id.* at 2031.

208 *See Alcan Aluminum Corp.*, 315 F.3d at 189; *see also* United States v. Kratt, 579 F.3d 558, 562 (6th Cir. 2009) (noting that "Justice Stevens' approach provides a logical subset of Justice Scalia's approach — at least in terms of outcomes").

209 543 U.S. 371 (2005).

210 United States v. Santos, 128 S. Ct. 2020, 2030 (2008) (plurality opinion) (citing *Martinez*, 543 U.S. at 378).

211 *Id.* at 2031.

212 *Martinez*, 543 U.S. at 378.

213 *Id.*

214 *Id.*

215 *Id.* at 374–75.

Category 2 aliens must also apply to Category 1 aliens [216] because "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one."[217] The Court argued that if one of the statute's applications required a limited interpretation, "[t]he lowest common denominator, as it were, must govern."[218]

The application of this decision to *Santos* is plain. Justice Stevens settled on a narrowed interpretation of Section 1956 for predicate gambling offenses because he feared the "perverse result" of applying the "gross receipts" definition.[219] Therefore, he indicated that the "lowest common denominator" in Section 1956's application was the "profits" definition. As the Court argued in *Martinez*,

> [i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, *even though the other of the statute's applications, standing alone, would not support the same limitation.*[220]

Justice Stevens' only defense for his position's conflict with *Martinez* was that the *Santos* case represented unspecified "compelling reasons" for sanctioning alternate definitions based upon the application of the statute.[221] However, as Justice Scalia noted, "[n]ot only do the Justices joining this opinion reject [Justice Stevens'] view, but also (apparently) so do the Justices joining the principal dissent."[222] Indeed, Justice Alito specifically disagreed with Justice Stevens' arguments, stating that "[t]he meaning of the term 'proceeds' cannot vary from one money laundering case to the next."[223] Thus, seven Justices, all but Justice Thomas[224] and Justice Stevens, affirmed *Martinez* by holding that there *must be* a singular interpretation of the term "proceeds" in Section 1956(a)(1).[225] As a

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216 *Id.* at 378.

217 *Id.*

218 *Martinez*, 543 U.S. at 378 (noting that if a statute has criminal applications, the rule of lenity becomes applicable).

219 United States v. Santos, 128 S. Ct. 2020, 2034 (2008) (Stevens, J., concurring).

220 *Martinez*, 543 U.S. at 380 (emphasis added); *see also Santos*, 128 S. Ct. at 2030 (plurality opinion).

221 *Santos,* 128 S. Ct. at 2032 (Stevens, J., concurring).

222 *Id.* at 2031 (plurality opinion) (citing *id.* at 2036, 2044).

223 *Id.* at 2045.

224 Interestingly, Justice Thomas also dissented in *Clark v. Martinez*, which is perhaps why he declined to join in Justice Scalia's attack on Justice Steven's concurrence.

225 Seven members of the Court explicitly rejected that the meaning of the term "proceeds" could vary based on the factual context of the offense. *See id.* at 2030 (plurality opinion) (Justice Scalia, jointed by Justices Souter and Ginsburg, cites *Clark v. Martinez,* 543 U.S. 371 (2005), for the proposition that "the meaning of words in a statute cannot change with the statute's application."); *see also Santos*, 128 S.Ct. at 2035–36 (Alito, J., dissenting) (Justice Alito, joined by the

majority of the Supreme Court settled on the "profits" definition for one predicate offense in *Santos*, it follows that a lower court's application of the "gross receipts" definition to another predicate offense would violate the principles of statutory interpretation set forth in *Martinez* absent a clear decision from the Supreme Court. The Narrow *Santos* courts (and the Moderate *Santos* courts, discussed *infra*) are effectively changing the meaning of a statute based upon its application, a position that is in direct conflict with binding Supreme Court precedent.

B. Moderate Santos*: A Critical View*

The Third Circuit,[226] the Sixth Circuit,[227] and the Ninth Circuit[228] Courts of Appeals, as well as at least one district court,[229] have thus far adopted a position that can perhaps best be characterized as moderate, and as such this Note classifies them as "Moderate *Santos*" courts. These courts advocate a position that flows neatly from Justice Stevens' concurrence, appearing to agree that they "need not pick a single definition of 'proceeds' applicable to every unlawful activity."[230] Indeed, these courts apply the "profits" definition to some SUAs outside of the gambling context but keep the "gross receipts" definition for other SUAs. This Part explains the varying rationales that underlie the Moderate *Santos* courts' decisions and provides criticism for their positions.

In *United States v. Yusuf*,[231] the Third Circuit considered a money laundering charge arising from the predicate offense of mail fraud.[232] After discuss-

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Chief Justice and Justices Kennedy and Breyer, notes that "I cannot agree with Justice Stevens' approach insofar as it holds that the meaning of the term "proceeds" varies depending on the nature of the illegal activity that produces the laundered funds."). How post-*Santos* money laundering cases based on SUAs outside of the gambling context would fare if they were taken to the Supreme Court is uncertain. As the Fifth Circuit noted,

> Thus the outcome could be that in a future case in the contraband realm, Justice Stevens would switch his definition to receipts, but one or more *Santos* dissenter would join the majority in holding that "proceeds" means *profits* — not because they have changed their minds about what Congress intended, but because principles of stare decisis and statutory interpretation demand that "proceeds" in this statute be interpreted consistently.

United States v. Brown, 53 F.3d 768, 784 (5th Cir. 2008). Additionally, the replacement of Justice Souter with Justice Sotomayor adds yet another wrinkle to how the Court would view post-*Santos* caselaw.

226 *Compare* United States v. Yusuf, 536 F.3d 178 (3d Cir. 2008), *with* United States v. Fleming, 287 Fed. App'x. 150 (3d Cir. 2008).

227 United States v. Kratt, 579 F.3d 558, 623 (6th Cir. 2009).

228 United States v. Van Alstyne, 584 F.3d 803 (9th Cir. 2009).

229 *See* United States v. Smith, 623 F. Supp. 2d 693, 702 (W.D. Va. 2009).

230 United States v. Santos, 128 S. Ct. 2020, 2032 (2008) (Stevens, J., concurring).

231 536 F.3d 178 (3d Cir. 2008).

232 *Id.* at 187.

ing the *Santos* case, the court acknowledged that *United States v. Grasso,*[233] a case in the original circuit split holding that "proceeds" meant "gross receipts" in Section 1956, had been overruled.[234] The court seemed to adopt Justice Scalia's view of the precedential effect of *Santos*, recognizing that "'proceeds' means 'profits' when there is no legislative history to the contrary."[235] The court went on to hold that "the 'proceeds' from the mail fraud in this case also amount to 'profits' of mail fraud [in accordance with *Santos*]" because the mail fraud in question had negligible expenses and considerable revenue.[236]

In a subsequent unpublished decision,[237] the Third Circuit in *United States v. Fleming*[238] dealt with a money laundering charge arising from the predicate offense of selling contraband.[239] The court held that "the term 'proceeds' includes ['gross receipts'] for drug sales."[240] The court put great weight on Justice Alito's point that five justices (Justice Stevens and the four dissenting Justices) agreed that "'proceeds' 'include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.'"[241] Given that a primary reason for this agreement in the *Santos* case was legislative history,[242] this decision appears in agreement with the earlier *Yusuf* decision. Thus, with these two opinions, the Third Circuit has applied the "profits" definition of "proceeds" to a predicate crime other than gambling, but retained the "gross receipts" definition in regard to the predicate crime of selling contraband.[243]

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233 381 F.3d 160 (3d Cir. 2004).

234 See discussion *supra* Part II.B.

235 *Yusuf*, 536 F.3d at 186 n.12.

236 *Id.* at 190 (citing United States v. Santos, 128 S. Ct. 2020, 2025, 2036 (2008)).

237 *See* U.S. Ct. of App. 3rd Cir. App. I, IOP 5.7 for a discussion of the precedential value of unpublished decisions in the Third Circuit.

238 287 Fed. App'x. 150 (3d Cir. 2008).

239 *Id.* at 155.

240 *Id.*

241 *Santos*, 128 S.Ct. at 2035 (Alito, J., dissenting).

242 *Santos*, 128 S.Ct. at 2035-2036 (Stevens, J., concurring) ("As Justice Alito rightly argues, the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.").

243 Whether the unpublished *Fleming* decision will be affirmed, or if the Third Circuit will use the "gross receipts" definition outside of the contraband context, remains to be seen. Several courts, when citing to the Third Circuit, have ignored the unpublished *Fleming* decision and use *Yusuf* to classify it as a Broad *Santos* Circuit, one that applies the "profits" definition to all predicate offenses. *See, e.g.*, United States v. Van Alstyne, 584 F.3d 803, 811 (9th Cir. 2009) ("The Third Circuit interpreted *Santos* broadly, as holding that 'the term 'proceeds,' as that term is used in the federal money laundering statute, applies to criminal profits, not criminal receipts, derived from a specified unlawful activity.'").

The Sixth Circuit in *United States v. Kratt*[244] specifically rejected the Narrow *Santos* courts' interpretations of both the *Marks* rule and the statutory principles of *Alcan Aluminum Corp.* when it embraced its Moderate *Santos* position, noting that "fundamental disagreements about how to interpret a statute do not necessarily destroy a subset-superset relationship between the two opinions."[245] The court argued,

> [T]here is a coherent way to apply *Marks* here. Justice Stevens' approach provides a logical subset of Justice Scalia's approach — at least in terms of outcomes. '[P]roceeds' does not always mean profits, as Justice Scalia concluded; *it means profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase*. Whenever a predicate offense satisfies this narrow rule, the Justices in the plurality would hold "proceeds" means profits as well, because they would define "proceeds" as profits for every predicate offense.[246]

The Sixth Circuit went on to hold that a court must consider, on an individualized predicate offense basis, (1) any contrary legislative history for either Section 1956 or 1957, and (2) any radical increase in the statutory maximum that would occur under either Section 1956 or Section 1957.[247] "If the *Santos* rule applies under either statute [1956 or 1957]," the court held, "then 'proceeds' means profits for both statutes."[248] Utilizing this analysis, the court then upheld the *Kratt* defendant's conviction for money laundering arising from bank fraud and making false statements on a loan application.[249] The court reasoned that these crimes, as they involve transferring funds, technically "merged" with Section 1957 money laundering, but not in a relevant way; Section 1956 and 1957 have lower statutory maximums than bank fraud and false statement offenses, and as such there could be no "perverse result" merger and the "profits" definition of *Santos* would not be triggered.[250]

The Ninth Circuit followed suit in *United States v. Van Alstyne*.[251] It noted that "only the desire to avoid a 'merger problem' united the five justices

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244 579 F.3d 558 (6th Cir. 2009).

245 *Id.* at 562.

246 *Id.* (emphasis added).

247 *Id.* at 563.

248 *Id.*

249 *Id.* at 563–64.

250 *Kratt*, 579 F.3d at 563-64.

251 584 F.3d 803 (9th Cir. 2009).

[in *Santos*]," and thus held that "'proceeds' means 'profits' where viewing 'proceeds' as receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*."[252] The *Van Alstyne* court, dealing with a Ponzi scheme defendant that had been convicted of seven counts of mail fraud and three counts of money laundering,[253] focused on the merger problem almost exclusively in the sense of the payments themselves, arguing that "*Santos* suggests . . . that the 'profits' definition of 'proceeds' should apply where the particular crime at issue depends on necessary payments, as it does here."[254] The court noted that "it appears that many, if not all, of the fraud counts of which [defendant] Van Alstyne was convicted could have been charged as money laundering as well, sharply illustrating the 'merger' problem."[255]

The court went on to dismiss two of Van Alstyne's convictions for money laundering that were based on "bank transfers inherent in the 'scheme' central to the mail fraud charges" while keeping a money laundering conviction for a transfer of funds that it held was unrelated to the underlying predicate offense of mail fraud.[256] Unlike the Sixth Circuit, the Ninth Circuit thus restricted its *Santos* analysis primarily to the "merger problem" of the actual payments constituting the charged conduct and did not focus on legislative history or whether the money laundering statute had a higher statuary maximum than the predicate offense.[257]

1. The *Clark v. Martinez* Problem

While the Moderate position avoids many of the issues discussed *supra* involving the *Marks* rule[258] and the principles of *Alcan Aluminum Corp.*,[259] this approach runs squarely into the *Clark v. Martinez* problem.[260] The Moderate approach, while perhaps more in keeping with an accurate working of the *Marks* rule, still changes the definition of "proceeds" dependent on the factual context of the predicate offense. This result is in conflict with the principles of statutory interpretation elucidated in *Martinez*.

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252 *Id.* at 814.

253 *Id.* at 809.

254 *Id.* at 815.

255 *Id.*

256 *Id.* at 815–16.

257 *Compare Van Alstyne*, 584 F.3d at 813-16, *with* United States v. Kratt, 579 F.3d 558, 562-64 (6th Cir. 2009).

258 See discussion supra Part IV.A.1.

259 See discussion supra Part IV.A.2.

260 See discussion supra Part IV.A.3.

2. An Unworkable Rule?

Despite its obvious conflict with previous Supreme Court precedent, the Moderate *Santos* position also has problems with practical application. A statutory definition that varies on an *ad hoc* basis dependent on the factual context of the offense runs the risk of doling out punishment in an exceedingly arbitrary fashion. Moreover, such a piecemeal interpretation would not adequately inform potential defendants of the conduct that would bring them within the purview of the statute. As described *supra*, even the Moderate courts themselves utilize different analytical paradigms to determine whether to use the "gross receipts" or the "profits" definition.[261]

Notably, the Sixth Circuit in *Kratt* argued that, although it felt compelled to use the Moderate position because of the *Marks* rule, it found the approach "unsatisfying," describing that:

> [This approach] will require us to define 'proceeds' for over 250 predicate offenses . . . a regime that will generate cottage industry of *Santos* litigation for years to come. And it will create a more severe notice/rule-of-lenity problem than the one that predated *Santos*.[262]

While cases challenging Section 1956 on the grounds of vagueness have thus far been unsuccessful,[263] some commentators have argued that the utilization of the *ad hoc* approach advocated by Justice Stevens would reinvigorate the vagueness doctrine's applicability to Section 1956 and render it unconstitutional.[264] Thus, although preferable analytically to the Narrow *Santos* position, the Moderate *Santos* approach both invites sentencing unpredictability and potentially opens up the statute to constitutional attacks.

C. *Broad* Santos*: A Possible Solution*

Several district courts have thus far adopted an expansive view of *Santos*, applying the "profits" definition without limit to predicate offenses outside of the gambling context; as such, this Note classifies them as Broad *Santos* courts. Some of these courts seem to have simply assumed that *Santos* applied

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261 *See* notes 226–256 and accompanying text.

262 *Kratt*, 579 F.3d at 563.

263 *See* William G. Phelps, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 1956, Which Criminalizes Money Laundering*, 121 A.L.R. FED. 525 (1994).

264 *See* Marc Fernich, *Outside Counsel: Money Laundering After Santos: A Supreme Mess*, 240 N.Y.L.J. 4 (col. 3), Oct. 17, 2008. Fernich makes an argument that the Court's ruling in *Santos* leaves section 1956 ripe for due-process vagueness challenge.

to all predicate offenses under the money laundering statute,[265] while at least one court felt that this application was dictated by the Supreme Court's ruling in *Clark v. Martinez*.[266] This Part will proceed to argue that the Broad *Santos* position should be adopted by the remainder of courts that have yet to speak on this issue.

1. The *Clark v. Martinez* Answer

Courts taking a Broad *Santos* position have often accepted the plurality's opinion with little fanfare. The District of New Jersey, for example, simply noted that it "accepts the plurality in *Santos* as a statement of law, as of the date the offenses were committed, namely, that 'proceeds' as used in the money laundering statute means 'profits' and not 'receipts.'"[267] Other courts have applied the "profits" definition to varying predicate offenses outside of the gambling context with little notice or mention of the rancorous debate among the courts.[268]

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[265] *See, e.g.*, Abuhouran v. Grondolsky, 643 F. Supp. 2d 654, 670 (D.N.J. 2009) ("Th[is] Court accepts the plurality in *Santos* as a statement of law, as of the date the offenses were committed, namely, that 'proceeds' as used in the money laundering statute means 'profits' and not 'receipts.'"); *see also infra* note 268.

[266] United States v. Hedlund, No. CR-06-346-DLJ, 2008 WL 4183958, at *6 (N.D. Cal. Sept. 09, 2008) (holding that "this Court believes that the Supreme Court in *Santos* had held that the word 'proceeds' in [the money laundering statute] means 'profits' and that *Clark v. Martinez* requires that this meaning must apply to every SUA listed in the statute"); *see also* United States v. Baker, No. 06-cr-20663, 2008 WL 4056998, at *3 (noting that "the government is on shaky ground in relying on Justice Stevens's distinctions" because seven justices agree that the meaning of a statute cannot vary based on its application.).

[267] *Abuhouran*, 643 F.Supp.2d at 670.

[268] United States v. Martin, No. 08-0026-02-CR-W-FJG, 2009 WL 330867, at *11 (W.D. Mo. Feb. 09, 2009) (noting that, for the predicate offense of unlawfully distributing prescription medication, "[w]hether the government will introduce sufficient evidence that the alleged laundered proceeds were profits of the unlawful activity is a question that cannot be resolved prior to the Government's presentation of its case to the jury"); United States v. Rezko, No. 05-CR-691, 2008 WL 4890232, at *5 n.2 (N.D. Ill. Nov. 12, 2008) (holding that a jury had been instructed on "profits" consistent with *Santos*, and noting that, regardless, the Seventh Circuit applies the "profits" definition to SUAs outside of the gambling context); United States v. Bohuchot, No. 3:07-CR-167-L, 2008 WL 4849324, at *4 (N.D. Tex. Nov. 10, 2008) (holding that, for the predicate offense of bribery, "the term 'proceeds' in the money laundering claim requires a showing of 'profits.'"); United States v. Poulsen 568 F. Supp. 2d 885, 914 (S.D. Ohio Aug. 01, 2008) (recognizing in dicta that, for the predicate offense of securities and wire fraud, if the government's case rested on "alle[gations] that the Defendants laundered money by paying their employees or paying costs associated with marketing their NPF programs or the services of outside professionals . . . . Then under *Santos*, Defendants' convictions would have to be vacated"); United States v. Shelburne, 563 F. Supp. 2d 601, 605 (W.D.Va. Jul. 01, 2008) (holding, for the predicate offense of healthcare fraud, that the narrow construction of Santos was incorrect, and expenses are not proceeds within the meaning of *Santos*); United States v. Thompson, No. 3:06-CR-123, 2008 WL 2514090, at *1 (E.D. Tenn. Jun. 19, 2008) (for the predicate offense of fraud, finding that "the government will have to prove at trial whether all or some part of the monies (the 'proceeds') paid to [the defendant] were profits").

In *United States v. Hedlund*,[269] an unpublished decision that was one of the first to arrive after *Santos* was issued, a court in the Northern District of California bucked this *lassiez-faire* trend and engaged in an analysis of *Santos* in the context of *Clark v. Martinez*.[270] Although the Ninth Circuit has since preempted this decision with *Van Alstyne*,[271] discussed *supra*,[272] the *Hedlund* court's analysis is useful. *Hedlund* involved a defendant that was convicted of one count of Use of Property for the Purposes of Manufacturing Marijuana[273] and one count of money laundering for a mortgage payment that he had made on the marijuana warehouse.[274] Rejecting the Narrow *Santos* position offered by the government, the *Hedlund* court noted,

> This Court cannot accept the government's argument. It does not confront *Clark v. Martinez,* and its consideration in *Santos*. . . . The specific result of *Santos* is that five Justices voted that "proceeds" means "profits" in 18 U.S.C. § 1956(a)(1)(A)(i). This decision came about in a case where the SUA was gambling, but the Supreme Court did *not* hold that their decision applied "only" to gambling cases. . . . Justice Alito agreed with this position, specifically stating that he did not "see how the meaning of the term 'proceeds' can vary depending on the nature of the illegal activity that produced the laundered funds." *Santos,* 128 S.Ct. at 2044 (Alito, J., dissenting).[275]

The *Hedlund* court went on to hold that "[t]he result of this analysis is that this Court believes that the Supreme Court in *Santos* has held that the word 'proceeds' in 18 U.S.C. § 1956(a)(1)(A)(I) means 'profits,' and that *Clark v. Martinez* requires that this meaning must apply to every SUA listed in the sta-

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269 No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sept. 9, 2008).

270 543 U.S. 371 (2005).

271 584 F.3d 803 (9th Cir. 2009).

272 *See supra* notes 251 – 257 and accompanying text.

273 *Hedlund*, 2008 WL 4183958 at *1 (in violation of 21 U.S.C. § 856(a)(1)).

274 *Id.* at *1 (in violation of 18 U.S.C. § 2956(a)(1)(A)(i)).

275 *Id.* at *6. Interestingly, the *Hedlund* court was dealing with a drug conviction, arguably one of the "heartland" activities singled out by both Justice Stevens and Justice Alito as requiring a "gross receipts" definition. *See* United States v. Santos, 128 S.Ct. 2020, 2035-36 (Alito, J., dissenting). The *Hedlund* court argued, "the government is correct that five of the Justices said that Congress intended that 'proceeds' should mean 'gross receipts' in drug trafficking cases. *But the bottom line is that five Justices said that, but they did not vote that.*" *Hedlund*, 2008 WL 4183958 at *6 (emphasis added).

tute."[276] The court subsequently vacated the defendant's money laundering conviction.[277]

As noted by *Hedlund*, the Broad *Santos* position is the only one of the approaches currently utilized by the courts that avoids the problematic issue of *Clark v. Martinez*. As this approach employs the "profits" definition of "proceeds" for all factual applications of Section 1956, it does not conflict with any binding principles of statutory interpretation.[278] As discussed *supra*,[279] the *Santos* Court settled on a "lowest common denominator"[280] when it held that the "profits" definition applied to the predicate offense of illegal gambling; to allow the definition to oscillate would be to "invent a statute rather than interpret one."[281]

2. The "Profits" Analysis: Workable in Practice

One of the primary concerns for both the government and the dissent in *Santos* were the "pointless and difficult problems" involved in proving the statutory elements of Section 1956 under a "profits" definition.[282] Justice Alito describes these as "nettlesome problems that Congress cannot have wanted," and this appears to be a primary rationale upon which the dissent advocated for a "gross receipts" definition.[283] Indeed, this argument was almost the entire basis for Justice Alito's legislative history argument: "it is most unlikely that Congress meant to enact a money laundering statute that would present daunting obstacles [to prosecution]."[284] However, the dire evidentiary consequences that Justice Alito predicted in his dissent have not come to pass. A great number of courts considering the scope of *Santos* have declined to answer the ultimate issue concerning the applicability of the "profits" definition but have, instead, moved on to quite easily classify the transaction in question as involving "profits."[285]

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276 *Id.*

277 *Id.*

278 United States v. Santos, 128 S. Ct. 2020, 2030 (2008) (plurality opinion).

279 *See* discussion *supra* Part IV.A.3 and Part IV.B.1.

280 Clark v. Martinez, 543 U.S. 371, 378 (2005).

281 *Id.*

282 *Santos*, 128 S. Ct. at 2038 (Alito, J., dissenting).

283 *Id.* at 2039.

284 *Id.* at 2040.

285 *See* United States v. Brown, 553 F.3d 768, 784 (5th Cir. 2008); United States v. Achobe, 560 F.3d 259, 269 (5th Cir. 2008); Choiniere v. United States, Nos. 3:07-CV-27 RM, 3:05-CR-56, 2009 WL 112585, at *12 (N.D. Ind. Jan. 14, 2009); United States v. Happ, No. CR2-06-129(8), 2008 WL 5101227, at *2–3 (S.D. Ohio Nov. 25, 2008); United States v. Bohuchot, No. 3:07-CR-167-L, 2008 WL 4849324, at *4–6 (N.D. Tex. Nov. 10, 2008); United States v. Varnado, No. 3:06CR415, 2008 WL 4773057, at *5 (W.D.N.C. Oct. 24, 2008); United States v. Spencer, No. 07-174 (JRT/JJG), 2008 WL 4104693, at *4–5 (D. Minn. Aug. 29, 2008); United States v. Baker,

Several courts thus far appear to be following Justice Scalia's "single instance" or "expense" test for proving profits:

> [T]o establish the proceeds element under the "profits" interpretation, the prosecution need to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction . . . *[w]hat counts is whether the receipts from the charged unlawful act exceeded the costs fairly attributable to it*.[286]

This test essentially attempts to eliminate precisely what caused the "merger problem" in *Santos*: overlap between the essential business-type transactions needed to complete the underlying offense and a double-counting of those transactions for the charge of money laundering. So far, it seems that the practical impact of *Santos* has been to center courts on the issue of whether the financial transaction in question can be categorized as an essential "expense" of the underlying crime.[287] This approach eliminates the "merger problem" and also Jus-

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No. 06-cr-20663. 2008 WL 4056998, at *4 (E.D. Mich. Aug. 27, 2008); United States v. Everett, No. CR 06-795-PHX-JAT, 2008 WL 3843831, at *7 (D. Ariz. Aug 14, 2008); United States v. Poulsen, 568 F. Supp. 2d 885, 913 (S.D. Ohio Aug. 1, 2008).

[286] *Santos*, 128 S. Ct. at 2029 (plurality opinion) (emphasis added); *see also Brown*, 553 F.3d at 784 (applying the "single instance" test to the SUA of unlawfully selling prescription medication and holding that "[i]n the instant case, the government introduced ample, unchallenged evidence that the sales were profitable, even with overhead and supplies factored in as 'costs fairly attributable' to the sale").

[287] *See* United States v. Yusuf, 536 F.3d 178, 190 (3d Cir. 2008) (holding that the "'proceeds' from the mail fraud in this case also amount to 'profits' of mail fraud" because the costs associated with mailing are negligible); Abuhouran v. Grondolsky, 643 F. Supp. 2d 654, 671 (D.N.J. 2009) ("Unlike paying a lottery winner, the money laundering payments in the instant case. . . . were not 'costs of a crime . . . .'"); *Happ*, 2008 WL 5101227, at *2 (for the SUA of fraud, "the transactions that formed the basis for [the defendants] money-laundering convictions had nothing to do with paying their expenses."); United States v. Rezko, No. 05-CR-691, 2008 WL 4890232 at *6 (N.D. Ill. Nov. 12, 2008) (holding that, for the SUA of mail fraud, the "checks did not constitute expenses of the underlying fraudulent activity."); *Bohuchot*, 2008 WL 4849324, at *4 (agreeing that "the transactions involved profits because the acceptance of a bribe by a government official does not involve any expenses."); *Varnado*, 2008 WL 4773057, at *6 (for the SUA of health care fraud, defendant's "profit sharing" agreement upon which her conviction was based explicitly provided that any profit was to be distributed equally among co-conspirators after receipts were paid); *Everett*, 2008 WL 3843831, at *7 (upholding a money laundering conviction for the SUA of defrauding the Bankruptcy Court, holding that the "proceeds" in question were not expenses but profits of the scheme); *see also Spencer*, 2008 WL 4104693, at *4 (for the SUA of cocaine distribution, house purchase was "personal expense paid with the profits of his illegal activity, rather than the type of business expense described in *Santos*."); *Baker*, 2008 WL 4056998, at *4 (noting that, for the SUA of drug trafficking, the defendants "purchased cars, homes, and jewelry for their own use with some part of the money that they did not intend for essential expenses related to drug trafficking . . . ."); *Poulsen,* 568 F. Supp. 2d at 913 (same); United States v. Shelburne, 563 F. Supp. 2d 601, 607 (W.D. Va. 2008) (finding, for the predicate offense of health care fraud, that "Dr. Shelburne's payments for building and equipment rent and dental supplies were not from proceeds as that term is properly construed under the money laun-

tice Alito's concerns about the forced development of "special accounting rules" and the like.[288]

Some examples of money laundering convictions that have actually been vacated by a court utilizing the "profits" approach for Section 1956(a)(1) offenses are useful here. The vacated money laundering charges include a doctor's conviction for "payments for building and equipment rent and dental supplies" for the predicate offense of healthcare fraud,[289] a marijuana agriculturalist's conviction for "a mortgage payment on the building used to grow the marijuana" for the predicate offense of "Use of Property for the Purposes of Manufacturing Marijuana,"[290] and a moonshiner's convictions for mortgage payments on a house stemming from the predicate offense of operating an illegal moonshining business.[291] These courts are not allowing nefarious criminals to escape justice upon technicalities; to the contrary, they are merely correcting the overlap between the substantive offense and the money laundering statute. Consequently, these courts are not allowing a conviction to be unduly enhanced for a transaction that forms the very basis of the underlying offense.[292]

Far from creating an "insurmountable hurdle"[293] for money laundering prosecutions, the use of the "profits" definition has proven quite workable in practice. Courts performing a "profits" analysis of varied predicate offenses have largely been eliminating the merger issues and leaving the rest, and the "merger problem," as *Santos* clearly indicates, was one that troubled all nine of the Justices.[294] Therefore, the Broad *Santos* position, in addition to being the most legally sound of the three paths currently taken by courts,[295] is also the most practical.

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dering statute . . . the two payments of salary to Dr. Shelburne were [gross receipts] since they could only come from the profits of his specified unlawful activity.").

288 *Santos*, 128 S. Ct. at 2040–41 (Alito, J., dissenting).

289 *Shelburne*, 563 F. Supp. 2d at 607.

290 *See* United States v. Hedlund, No. CR-06-346-DLJ, 2008 WL 4183958, at *5 (N.D. Cal. Sep. 09, 2009).

291 *See* United States v. Smith, 623 F. Supp. 2d 693, 702–03 (W.D.Va. 2009).

292 *See, e.g.*, *id.* at 702.

> Here, as in *Santos,* it would be a "perverse result" if revenue from the illegal moonshine business used to pay its essential expenses could constitute a money laundering violation. The maximum statutory penalty for any underlying moonshine violation charged in this case is five years (*see* 18 U.S.C. §§ 371, 1952(a)(3)(A); 26 U.S.C. § 5601(a)), while the statutory maximum for money laundering is 20 years (*see* 18 U.S.C. § 1956(a)(1)).

Id.

293 Petition for Certiorari, United States v. Santos, No. 06-1005, at 15 (Jan. 22, 2007).

294 *Santos*, 128 S. Ct. at 2026, 2033, 2044.

295 *See* discussion *supra* Part IV.A.3. and Part IV.B.1.

3. The Impact of Indecision

a. The Lack of Uniformity

As discussed *supra*, the punishments for violating Section 1956 are extremely harsh,[296] and defendants who committed money laundering before the statutory amendments of May 20, 2009, are now faced with a virulent statute in a state of flux. As long as the courts remain split on this issue, it is inevitable that like defendants will be treated dissimilarly merely based on the jurisdiction of their court. While one defendant may find that his financial transaction consisted of an unchargeable "expense" of his underlying crime, a similar defendant making the exact same transaction in a different state may find that he faces a twenty-year statutory maximum,[297] a large fine,[298] forfeiture of any property "involved in" the transaction,[299] and a two-level increase in his base offense level.[300]

b. The Complication of Retroactivity

This situation is further complicated by the potential for *Santos* to apply retroactively on collateral review. A newly created rule announced by the Supreme Court can apply retroactively on collateral review in an otherwise timely, first habeas motion only if "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[301] A rule is substantive if it "alters the range of conduct or the class of persons that the law punishes."[302] For a Moderate or Broad *Santos* court, there is potentially an argument that the "profits" definition of Section 1956 could be applied retroactively; the narrowed interpretation of "proceeds" in Section 1956 could be considered to "alter[] the range of conduct . . . that the law punishes,"[303] and the Supreme Court has previously held that "decisions that narrow the scope of a criminal statute by interpreting its

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296 *See* discussion *supra* Part II.A.

297 *See* 18 U.S.C. § 1956: "Whoever [violates this statute] . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both."

298 *Id.*

299 18 U.S.C. §§ 981–982.

300 U.S. SENTENCING GUIDELINES MANUAL, *supra* note *5*, at § 2S 1.1(b)(2)(B).

301 Whorton v. Bockting, 549 U.S. 406, 416 (2007) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)). It appears that *Santos* would not be applicable in a second or successive habeas petition pursuant to 28 U.S.C. § 2255(h)(2) (2006) due to the restrictions of Tyler v. Cain, 533 U.S. 656, 662 (2001), which specifies that "the requirement [of retroactivity] is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review."

302 Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

303 *Id.*

terms" are retroactive substantive rules.[304] Indeed, the *Santos* case itself arose from a collateral attack.[305]

The decisions regarding the retroactive applicability of *Santos* have been spotty at best. While a majority of courts thus far reject retroactivity,[306] at least one district court has retroactively applied *Santos* as a substantive change in the law.[307] However, for Narrow *Santos* courts, even the *argument* for retroactive applicability is almost completely foreclosed by the fact that the "profits" definition, and any accompanying retroactive decriminalization, is limited solely to the predicate offense of operating an unlawful gambling business.[308] Thus, for all predicate offenses under Narrow *Santos* courts and some predicate offenses under Moderate *Santos* courts, any argument for retroactive application is an immediate failure. This means that the potential for disparate punishment for the same conduct has the possibility of stretching even further than discussed *supra*. In a Broad *Santos* jurisdiction, both new defendants and previously convicted felons whose money laundering convictions are not based on "profits" could potentially benefit greatly from *Santos*; in a Narrow *Santos* jurisdiction, there is no question that defendants' previous convictions and substantially higher sentences[309] will remain untouched.

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304 *Id.* at 351–52.

305 Santos v. United States, 461 F.3d 886 (7th Cir. 2006).

306 *See, e.g.*, Wooten v. Cauley, No. 09-CV-67-HRW, 2009 WL 3834093, at *5 (E.D.Ky. 2009) (citing cases).

307 Siu v. United States, Nos. C08-1407-JCC, CR02-0192-JCC, 2009 WL 2032028, at *8 (W.D. Wash. 2009) ("Here, as the government concedes, both *Santos* and *Cuellar* are new substantive rules because they narrow the scope of the federal money laundering statute. Because this is Petitioner's first § 2255 motion, *Santos* and *Cuellar* apply retroactively to his motion."); *see also* Santana v. United States, Nos. C08-1493-JLR, CR06-220-JLR, 2009 WL 1228556, at *1 n.2 (W.D. Wash. 2009) (noting that the government conceded that *Santos* may be applied retroactively on collateral review).

308 *See, e.g.*, Ghali v. Roy, No. 5:08-CV-135, 2009 WL 1929847, at *4 (E.D. Tex. 2009) (After analyzing *Santos,* this court noted that "this court cannot entertain the proposition in a Section 2241 proceeding unless *Santos* affirmatively decriminalized petitioner's conduct. As determined above, *Santos* did not decriminalize financial transactions conducted with the funds from drug trafficking."); Arnaiz v. Hickey, No. CV208-97, 2009 WL 2971638, at *3 (S.D. Ga. 2009) ("Arnaiz fails to present evidence that his claims are based on a retroactively applicable Supreme Court decision because *Santos* is not applicable to the case at bar.").

309 The situation involving retroactivity is especially important to those defendants who were sentenced under the pre-2001 money laundering guidelines, which were not made retroactive. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, at app. C, amend. 634. For white-collar criminals sentenced under the pre-2001 Guidelines, the addition of a money laundering charge regularly resulted in a sentence almost four times larger than what would otherwise have been incurred. Carpenter, *supra* note 35, at 558–59 (citing THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE, §§ 2F1.1, 2S1.1 (1998)).

c. Lessons from FERA?

With testimony that "[t]he Court's [*Santos*] decision effectively limited the money laundering statute to profitable crimes,"[310] Congress worked to correct the massive judicial confusion after *Santos* by amending the money laundering statue to define "proceeds" as "gross receipts."[311] Although not applicable to crimes that occurred prior to its enactment, FERA contains some interesting passages for courts and attorneys still jockeying for their post-*Santos* position.

FERA contains a section entitled "Sense of the Congress and Report Concerning Required Approval for Merger Cases."[312]

> (1) SENSE OF CONGRESS. — It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the relevant United States Attorney, *if the conduct to be charged as "specified unlawful activity" in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.*[313]

The section goes on to require that the Attorney General submit a report to both the House and Senate Committees on the Judiciary on May 20, 2010.[314] These reports must include (1) "[t]he number of prosecutions . . . undertaken during the previous one-year period after prior approval . . . classified by type of offense," (2) "[t]he number of prosecutions . . . undertaken without such prior approval . . . , classified by type of offense, and the reasons why such prior approval was not obtained," and (3) "[t]he number of times during the previous year in which an approval . . . was denied."[315]

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310 *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing Before the United States Senate Committee on the Judiciary*, Feb. 11, 2009, *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3651&wit_id=7604 (statement of Rita Glavin, Acting Assistant Attorney General, Criminal Division, United States Department of Justice).

311 *See* 18 U.S.C. § 1956(c)(9) (West 2009) ("[T]he term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.").

312 Pub. L. No. 111-21, 123 Stat. 1617, 1618–19.

313 *Id.* at 1619.

314 *Id.*

315 *Id.*

While it is too early to tell what effect this "Sense of the Congress" will have on money laundering prosecutions, what this section does reveal is that the fundamental unfairness of the merger problem as discussed in *Santos* is also a major concern for the 111th Congress. The adoption of this provision in FERA represents a major victory for the defense bar and a step forward in ensuring future fairness in charging decisions.[316] Regardless, the original Money Laundering Control Act contained no such merger protections. The Narrow *Santos* courts necessarily limit their ability to address the injustice of this important issue when they refuse to expand the protections of *Santos* to eliminate this problem, a problem that is now recognized by both Congress and the Supreme Court.

d. A Call for Clarity

The three-way division in the courts after *Santos* creates severe disparities between similarly situated defendants. Both the Narrow and the Moderate *Santos* courts, by advocating differing interpretations of the word "proceeds" in Section 1956, exacerbate this disparity as well as run afoul of established principles of statutory interpretation. Given that Broad *Santos* courts can provide uniformity and both Broad and Moderate *Santos* courts have proven that the application of the "profits" definition outside of the gambling context can be practically applied and eliminate the "merger problem," the proper interpretation of the *Santos* decision becomes more clear. It is the hope of this Author that the analysis provided *supra* of the post-*Santos* decisions on the scope of Section 1956 clarifies both the current state of the law as well as persuades that the fastest way to equity, clarity, and uniformity is the unvarying application of the "profits" definition to all of Section 1956's predicate offenses.

V. CONCLUSION

With the Supreme Court's decision in *United States v. Santos*,[317] the ever-expanding world of federal money laundering became a little smaller; unfortunately, it did not become any clearer. This Note attempts to shed some light on a definitional debate that has already caused two separate circuit splits and continues to create a flurry of activity in undecided courts. The current three-way division of the courts ensures that there will be a great deal of protracted litigation in the future — all that remains is to choose sides.

This Note demonstrates that courts should use the Broad *Santos* model to interpret the *Santos* decision. Applying the "profits" definition of "proceeds"

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316 *See* Tiffany M. Joslyn, *FERA's Silver Lining – An Account of NACDL's Efforts Combating Overcriminalization*, THE CHAMPION, Aug. 2009, at 56, *available at* http://www.criminaljustice.org/public.nsf/01c1e7698280d20385256d0b00789923/8997d590b8b2a37b85257643005f5783?OpenDocument.

317 128 S. Ct. 2020 (2008).

to all Section 1956 predicate offenses is the soundest way to ensure conformance with precedent as well as maintain the principles of uniformity and equity in the federal money laundering statute.

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